Supreme Court of the United States

OCTOBER TERM, 1969

No. 728

ROBERT DEAN DICKEY,

Petitioner,

—v.—

FLORIDA,

Respondent.

ON WRIT OF CERTIORARI TO THE DISTRICT COURT OF APPEAL OF FLORIDA, FIRST DISTRICT

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1969

No. 728

ROBERT DEAN DICKEY, PETITIONER

v.

STATE OF FLORIDA, RESPONDENT

CHRONOLOGICAL LIST OF IMPORTANT DATES

1. Affidavit and Warrant issued—July 1, 1960
2. Detainer Warrant sent to Federal Authorities—September 2, 1960
3. Writ of Habeas Corpus Act—Prosequendum dated October 29, 1962, filed
4. Order denying Writ dated December 1, 1962, filed Clerk of the Circuit Court, December 3, 1962
5. Writ of Habeas Corpus Ad Prosequendum, dated April 1, 1963
6. Order Denying Writ, dated April 15, 1963, filed April 16, 1963, Clerk of the Circuit Court
7. Motion for Speedy Trial or Dismissal, dated March 28, 1966
8. Order Denying Motion, dated April 13, 1966, filed April 13, 1966, Clerk of the Circuit Court
9. Petition for Dismissal dated September 1, 1967, filed September 6, 1967, Clerk of the Circuit Court
10. Order for Writ of Habeas Corpus Ad Prosequendum, dated December 15, 1967, filed Clerk of the Circuit Court, December 15, 1967

11. Information charging Robbery dated December 15, 1967, filed Clerk of the Circuit Court, December 15, 1967
12. Motion to Quash, dated January 30, 1968, filed January 31, 1968, Clerk of the Circuit Court
13. First Motion for Continuance dated January 30, 1968, filed January 31, 1968, Clerk of the Circuit Court
14. Affidavit dated January 31, 1968, filed January 31, 1968 Clerk of the Circuit Court
15. Hearing held on January 31, 1968, all pending motions
16. Order Granting Motion for Continuance, entered January 31, 1968
17. Second Motion for Continuance, dated February 12, 1968, filed February 13, 1968, Clerk of the Circuit Court
18. Order Denying Motion to Quash and Second Motion for Continuance, February 13, 1968, filed February 13, 1968, Clerk of the Circuit Court

IN COURT OF JUSTICE OF PEACE
FIRST DISTRICT, GADSDEN COUNTY
STATE OF FLORIDA

STATE OF FLORIDA

vs.

ROBERT DEAN DICKEY

WARRANT, CRIMINAL CHARGE

In the Name of the State of Florida, to all and Singular the Sheriffs and Constables of the State of Florida.

Whereas, Robert Martin has this day made oath before me that on the 28th day of June, A. D. 1960 in the County and District aforesaid, one Robert Dean Dickey, did then and there by force, violence or assault or putting to fear, feloniously, rob, steal and take away from the person or custody of Mrs. Ralph Clark certain property then and there the subject of larceny, to-wit; United States Currency or money of the value of $40.00 of the property, goods and chattels of Clarks Motor Court; a better description being to your informer unknown contrary to the statute in such cases made and provided and against the peace and dignity of the State of Florida:

These are, Therefore, to Command you to arrest Robert Dean Dickey the said defendant and bring him before me to be dealt with according to law.

Given under my hand and seal this 1st day of July, A. D. 1960

State of Florida
Gadsden County

Signed A. B. BLACKBURN [SEAL]
Justice of the Peace,
First District.

I, A. B. Blackburn Justice of the Peace District Number one of Gadsden County Florida, certify that the foregoing is a true and correct copy of the warrant which I issued for the arrest of Robert Dean Dickey, July 1 1960 in the case of State of Florida vs Robert Dean Dickey for Armed Robbery Quincy Florida September 27th A.D. 1967

Signed A. B. Blackburn

IN JUSTICE COURT,
FIRST DISTRICT,

GADSDEN COUNTY,
STATE OF FLORIDA

STATE OF FLORIDA

vs.

ROBERT DEAN DICKEY

WARRANT

For Criminal Charge
Armed Robbery

Returnable the _____ day

of _____, A. D. 19___

Defendant pleads _____

A. B. BLACKBURN
Justice of the Peace,
First District.

Bail is hereby fixed in the amount of

_____

Received this Warrant _____
day of _____, A. D. 19__,
and executed it on the _____
day of _____
A. D. 19__, by arresting the within-named
_____
and having_____now before the Court
_____, 19__
_____

Sheriff, Deputy Sheriff, Constable

Fees:

Arrest - - - - - - -	$_____
Return - - - - - - -	_____
Committing to Jail - - -	_____
Mileage - - - - - - -	_____
Release - - - - - - -	_____
Approving Bond - - -	_____
	_____
Total - - - - - - -	$_____

_____

IN THE SUPERIOR COURT
FOR GADSDEN COUNTY
GADSDEN, FLORIDA

No.

ROBERT DEAN DICKEY, PETITIONER

—versus—

WILLIAM D. HOPKINS, State Attorney,
Gadsden County, Florida, RESPONDENTS

WRIT OF HABEAS CORPUS AD-PROSEQUENDUM

I Robert Dean Dickey hereafter known as the petitioner in the foregoing action, first being duly sworn by the Undersigned Parole Officer, according to law, depose and say; that he is a Citizen of the United States of America, by birth, who hereby petitions this Honorable Court for Writ of Habeas Corpus. *Requesting The Above Named Respondent to Show Cause Why He Is Violating your Petitioners Constitutional Rights As Guaranteed By The Sixth And Fourteenth Amendments of The United States Constitution.*

Petitioner states that he is presently confined in the United States Penitentiary at Alcatraz, California by virtue of a sentence imposed upon him by a United States District Court.

Petitioner further states that the aboved named Respondent is holding a warrant for the Arrest of your petitioner Charging, "Armed robbery" said Warrant has been in effect since on or about the 1st day of July, 1960, thus depriving petitioner of his rights as guaranteed by the Sixth Amendment of the United States Constitution, Since said warrant has not been executed in a fair and speedy trial.

If the Court please note: The Sixth Amendment of The United States Constitution Provides That: In All Criminal Prosecutions The Accused Shall Enjoy The Right to A Speedy and public Trial. The Usual method for The Enjoyment of this Protection Is to Ask for A Trial. Continuing, It Is Stated, "One Already Serving a term may be tried on Charges Pending Against Him because of This Valunable Guarantee.". see: McCarty vs. U.S. (8th Cir.) 19 F. (2nd) 462; Whitaker vs. Humming, (9th Cir.) 19 F. (2nd) 760; Beaver vs. Hanbert, 198 U.S. 77, 25, 5, Ct. 573, 49, Led. 950.

Therefore your petitioner will pray that this Honorable Court uphold his Constitutional Rights and that petitioner be brought before this Court for a trial by Jury or that the Charge be Dismissed for want of Prosecution.

It is possible that the Court may question the issuance of this Writ since your Petitioner is being held in the United States Penitentiary at Alcatraz, California. Toward that your Petitioner wishes to state that such an issuance is legal and just, in that the Writ issued by the State of Florida, for the production of Petitioner is not directed against the State of California, but to the contrary, since the Writ for the Production of Petitioner, will be against the Government of the United States, the law of which is sovereign and recognizes no Boundaries for the purpose of Criminal Prosecution.

Your Petitioner hereby sets out the following Cited Cases directly in point with this cause;

In Cato vs. Smith, C.C.A.; Col. 104 F. (2nd) 885, 308, 60 S. Ct. 177, 846 ed. 508, the Court Said: *The fact that a Federal Prisoner Indicted In a State Court must remain In the custody of a Federal Agent During Trial in a State Court does not deprive the State Court, and the Defendant, can conduct His defense as Effectively as if He were in the Custody of an Officer of the State Court.*

In U.S. vs. Cox, 5th Circuit, 47 F.ed. (2nd) P. 988, 989, The Court Stated; *The Rights Granted to the Defendant to have a Fair and Speedy trial is not Lost to Him or in any Substantial way abridged because of his*

being confined in a penitentiary. Also See; Pose vs. Tissondin, 258 U.S. 254.

In U.S. vs. Elesupous, O.C. New Jersey, 1942 U.S. Supp 777, The Court stated the following: *The reason for Granting an immediate Trial or to Dismiss the Indictment, Is that in all delayed cases, the witnesses as to the Events occurring many months or years ago are not clear and for this reason among others the Congress of the United States imposed a Statute of Limitations, to prevent Long delayed Prosecutions.*

The due process of Law Clause of the fourteenth Amendment Gives the Federal Courts power and the duty to nullify detainers, and to enjoin further prosecutions or Harassments, In cases where a State denies the demands of an Accused for Speedy Trial.

In People vs. Becker, 135 Misc. 405; the court had this to say; *When a person charged with a crime is willing to proceed at once to trial, no delay on the part of the Prosecution is reasonable, Except that which is necessary for Proper Preparation and to secure witnesses.*

In People vs. Vitusky; 155 App. Dive. 139; People vs. Walch; 172 App. Dive. 2261. The court had this to say; *Criminal Procedure provides for the dismissal of Criminal action for want of Prosecution upon the application of Defendant.*

In People vs. Harris; (1944) 182 Misc. 787, the Court Said; *An Indicted Person so entitled to a speed trial may insist upon a trial or the dismissal of the Indictment.*

In Reit vs. Meyer, 160 App. Dive. 752, 146, The Court had this to say; *Prisoner against whom another charge, other than the one which he was convicted, is entitled to a fair and speedy trial thereon.* Also See: People vs. Corrando, 150 Misc. 787, 270.

In People vs. Evans; 224 App. Dive. 415; The Court Said: *Rights of People of alleged crimes cannot be disregarded.* Also See; Thornton vs. State; 7 Ga. App. 752. 67 S.E. 10 55., State vs. White; 264 page 647, 39 Okla, 242., Gains vs. Washington; 227 U.S. 81, 48 Sct. 468., Washington vs. U.S. 1 F. 2d. 154 (e.e. A.7)., Raimo vs. State of New Jersey, Nov. 10th, Nov. 20th (1958)., Fowler vs. Hunter; 1947, e.e. A., 10, 164 F. 2d. 668.,

Petitioner states in view of the above cited cases there should be no doubt as to the legality of this cause. However your petitioner will set out the following authority of Law, showing that your Petitioner can be obtained for trial in this Honorable Court.

The Legality of such a cause is to be found on page 719 Bulletin No. 384 of the manual of Policies and Procedure, issued by the United States Department of Justice, Federal Bureau of Prisons, The summary of which Follows: "An application for the production of a Federal Prisoner Should be submitted to the criminal division of the United States Department of Justice, Federal Bureau of Prisons, Washington 25, D.C., and the prisoner can be produced upon a writ arising out of a State Court.

And for such Writ your Petitioner will Ever Pray.

Petitioner alleges that the charge against him is false and that he did not commit the above mentioned crime. Petitioner requests the above named Respondent to permit and immediate trial, in order to enable your Petitioner to properly protest his right as guaranteed under the Constitution of the United States.

Your Petitioner now moves and prays this Honorable Court to Cause Petitioner to be brought to appear before it by means of the proper process of the Law, namely; a Writ arising out of this Court ordering Petitioner before it for a trial by Jury or that an order be issued Dismissing said Charge.

Petitioner further asks this Court to recognize that petitioner is a layman with little formal education and no training in the profersion of Law and therefore to give more heed to the intent and purpose of petitioner than to any possible errors of form or lack of proper legal terminology within this petition.

Respectfully Submitted

/s/ Robert Dean Dickey
ROBERT DEAN DICKEY
Petitioner

Subscribed and Sworn to before me this 29 day of October, 1962.

/s/ [Illegible]
Parole Officer

Parole Officer Authorized by Act of July 7, 1955 to Administer Oaths (18 U.S.C. 4004).

AFFIDAVIT OF POVERTY

Pursuant to the Laws of the State of Florida

I certify that, first being duly sworn according to Law, deposes and say; that he is a poor person without sufficient funds in which to pay for the costs connected with this action, However Affiant verily believes that he is entitled to the redress Sought. Therefore Affiant will ever pray that this action be allowed at the expense of the State of Florida, which is proper by Law. Further —that the above action be entered and docketed so as to have justice served.

Respectfully Submitted

/s/ Robert Dean Dickey
ROBERT DEAN DICKEY
Affiant

Subscribed and Sworn to before me this 29 day of October, 1962.

/s/ [Illegible]
Parole Officer

Parole Officer Authorized by Act of July 7, 1955 to Administer Oaths (18 U.S.C. 4004).

CERTIFICATE OF SERVICE

I certify that I have this day served a copy of the foregoing action upon this Honorable Court by placing a copy of same in the U.S. Mail, Postage Prepaid, addressed to the Clerk of the above named Court.

/s/ Robert Dean Dickey
ROBERT DEAN DICKEY
Petitioner

Subscribed and Sworn to before me this 29 day of October, 1962.

/s/ [Illegible]
Parole Officer

Parole Officer Authorized by Act of July 7, 1955 to Administer Oaths (18 U.S.C. 4004).

IN THE CIRCUIT COURT
OF THE SECOND JUDICIAL CIRCUIT
IN AND FOR GADSDEN COUNTY, FLORIDA

ROBERT DEAN DICKEY, PETITIONER

vs.

WILLIAM D. HOPKINS, State Attorney,
Gadsden County, Florida, RESPONDENT

Petitioner has filed in this Court pleadings entitled "Writ of Habeas Corpus Ad Prosequendum", in which the State Attorney of this Judicial Circuit is named respondent.

If this pleading is regarded as a Petition for a Writ of Habeas Corpus it must be denied for three reasons. There is no showing that petitioner is being illegally restrained of his liberty. If he is illegally restrained of his liberty it is by the United States of America and this Court lacks jurisdiction to review judgments of Federal Courts. There is no showing that petitioner is in the custody of or under control of the named respondent —Honorable William D. Hopkins, State Attorney.

But petitioner prays that any informality in his Petition be overlooked and that his rights be protected. The Court will, therefore, consider the petitioner's basic complaint with the view of determining what, if any, relief he may be entitled to seek at this time.

Petitioner is charged with a criminal offense in Florida. He is presently confined in a Federal prison as a result of conviction of a federal offense. He seeks to *require* the State of Florida to bear the expense of securing a loan of his person from the Federal government and have him brought to Florida for trial. Otherwise, he says, he is being denied the right to a speedy trial. He is not entitled to this relief for three reasons:

1. Petitioner's present inability to voluntarily appear and demand a trial in Florida is due to his voluntary act in committing a Federal crime, the natural result of which was his imprisonment in a Federal penitentiary.

His absence from Florida and the delay in his trial is thus, in law, entirely voluntary on his part.

2. The petitioner's opinion that he cannot get a fair trial in Florida after the expiration of his Federal sentence is not necessarily correct—witnesses may or may not be unavailable—their memories may or may not be faulty. If the circumstances of a particular case are such that a fair trial cannot be had because of delay, that question can only properly be raised and decided when the defendant is brought before the proper court for arraignment.

3. If petitioner is being improperly denied a trial at this time, this is not the act of Florida. It is the act of the United States. If petitioner's present inability to appear voluntarily in Florida and demand a trial is violating a constitutional right under the Sixth Amendment (a question not being decided) that is the act of Federal authorities and petitioner's source of relief, if any, is with Federal authorities.

Petition Denied.

DONE at Quincy, Florida this 1st day of December, A. D. 1962.

/s/ Hugh M. Taylor
Circuit Judge

IN THE SUPERIOR COURT
FOR GADSDEN COUNTY
GADSDEN, FLORIDA

No.

ROBERT DEAN DICKEY, PETITIONER

—*versus*—

WILLIAM D. HOPKINS, State Attorney,
Gadsden County, Florida, RESPONDENTS

WRIT OF HABEAS CORPUS AD-PROSEQUENDUM
April 1, 1963

As per Judge Taylor's request, a certified copy of Denial of Petition mailed to Robert Dean Dickey 12/5/62.

I Robert Dean Dickey hereafter known as the petitioner in the foregoing action, first being duly sworn by the Undersigned Parole Officer, according to Law, depose and says that he is a Citizen of the United States of America, by birth, who hereby petitions this Honorable Court for Writ of Habeas Corpus *Requesting The Above Named Respondent to Show Cause Why He Is Violating your Petitioners Constitutional Rights As Guaranteed By The Sixth And Fourteenth Amendments of The United States Constitution.*

Petitioner states that he is presently confined in the United States Penitentiary at Leavenworth, Kansas by virtue of a sentence imposed upon him by a United States District Court.

Petitioner further states that the aboved named Respondent is holding a warrant for the Arrest of your petitioner Charging, "Armed robbery" said Warrant has been in effect since on or about the 1st day of July, 1960, thus depriving petitioner of his rights as guaranteed by the Sixth Amendment of the United States Constitution, Since said warrant has not been executed in a fair and speedy trial.

If the Court please note: The Sixth Amendment of The United States Constitution Provides That: In All Criminal Prosecutions The Accused Shall Enjoy The Right to A Speedy and public Trial. The Usual method for The Enjoyment of this Protection Is to Ask for A Trial. Continuing. It Is Stated, "One Already Serving a term may be tried on Charges Pending Against Him because of This Valuable Guarantee." see: McCarty vs. U.S. (8th Cir.) 19 F. (2nd) 462; Whitaker vs. Humming (9th Cir.) 19 F. (2nd) 760; Beaver vs. Hanbert, 198 U.S. 77. 25, 5. Ct. 573. 49. Led. 950.

Therefore your petitioner will pray that this Honorable Court uphold his Constitutional Rights and that petitioner be brought before this Court for a trial by Jury or that the Charge be Dismissed for want of Prosecution.

If is possible that the Court may question the issuance of this Writ since your Petitioner is being held in the United States Penitentiary at Leavenworth, Kansas toward that your Petitioner wishes to state that such an issuance is legal and just, in that the Writ issued by the State of Florida, for the production of Petitioner is not directed against the State of Kansas, but to the contrary since the Writ for the Production of Petitioner, will be against the Government of the United States, the Law's of which is sovereign and recognizes no Boundaries for the purpose of Criminal Prosecution.

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In Reit vs. Myer, 160 App. Dive. 752, 146, The Court had this to say; *Prisoner against whom another charge other than the one which he was convicted, is entitled to a fair and speedy trial thereon* Also See: People vs. Corrando, 150 Misc. 787, 270.

In People vs. Evans; 224 App. Dive. 415; The Court Said: *Rights of People of alleged crimes cannot be disregarded.* Also See; Thornton vs. State; 7 Ga. App. 752 67 S.E. 1055., State vs. White; 264 page 647, 39 Okla, 242., Gains vs. Washington; 227 U.S. 81, 48 S.ct. 468., Washington vs. U.S. 1 F 2d 154 (e. e. r. 7)., Raimo vs. State of New Jersey, Nov. 10th, Nov, 20th (1958)., Fowler vs. Hunter; 1947, e.e.r., 10, 164 F 2d. 668.,

Petitioner states in view of the above cited cases there should be no doubt as to the legality of this cause. However your petitioner will set out the following authority of law showing that your Petitioner can be obtained for trial in this Honorable Court.

The Legality of such a cause is to be found on page 719 Bulletin No. 384 of the manual of Policies and Procedure, issued by the United States Department of Justice, Federal Bureau of Prisons, The summary of which Follows: "An application for the production of a Federal Prisoner Should be submitted to the criminal division of the United States Department of Justice, Federal Bureau of Prisons, Washington 25, D.C., and the prisoner can be produced upon a writ arising out of a State Court.

And for Such Writ your Petitioner will Ever Pray.

Petitioner alleges that the charge against him is false and that he did not commit the above mentioned crime. Petitioner requests the above named Respondent to permit and immediate trial, in order to enable your Petitioner to properly protest his right as guaranteed under the Constitution of the United States.

Your Petitioner now moves and prays this Honorable Court to Cause Petitioner to be brought to appear before it by means of the proper process of the Law, namely, a Writ arising out of this Court ordering Petitioner before it for a trial by Jury or that an order be issued Dismissing said Charge.

Petitioner further asks this Court to recognize that petitioner is a layman with little formal education and no training in the profersion of Law and therefore to give more heed to the intent and purpose of petitioner than to any possible errors of form or lack of proper legal terminology within this petition.

Respectfully Submitted

/s/ Robert Dean Dickey
ROBERT DEAN DICKEY
Petitioner

Subscribed and Sworn to before me this 1st day of April, 1963.

/s/ [Illegible]
Parole Officer

Authorized by the Act of July 7, 1955 to administer oaths (18 U.S.C. 4004).

AFFIDAVIT OF POVERTY

Pursuant to the Law's of the State of Florida

I certify that, first being duly sworn according to Law, deposes and say; that he is a poor person without sufficient funds in which to pay for the costs connected with this action, However affiant verily believes that he is entitled to the redress Sought. Therefore Affiant will ever pray that this action be allowed at the expense of the State of Florida, which is proper by Law. Further—that the above action be entered and docketed so as to have justice served.

Respectfully Submitted

/s/ Robert Dean Dickey
ROBERT DEAN DICKEY
Affiant

Subscribed and Sworn to before me this 1st day of April, 1963.

/s/ [Illegible]
Parole Officer

Authorized by the Act of July 7, 1955 to administer oaths (18 U.S.C. 4004).

[Certificate of Service (Omitted in Printing)]

IN THE CIRCUIT COURT
OF THE SECOND JUDICIAL CIRCUIT
IN AND FOR GADSDEN COUNTY, FLORIDA

ROBERT DEAN DICKEY, PETITIONER

vs.

WILLIAM D. HOPKINS, State Attorney,
Gadsden County, Florida, RESPONDENTS

ORDER—April 15, 1963

This cause coming on to be heard upon a new Petition filed by the Petitioner which is largely a repetition of the original Petition heretofore considered by the Court and the merits of which have been fully discussed in the Order of this Court entered on the 1st day of December, 1962, it is

CONSIDERED, ORDERED and ADJUDGED by the Court that the Petition of Robert Dean Dickey for Writ of Habeas Corpus against the Respondent, William D. Hopkins, State Attorney, Gadsden County, Florida, be and the same is hereby denied.

DONE and ORDERED this 15th day of April, A. D. 1963.

/s/ Hugh M. Taylor
Circuit Judge

IN THE SUPERIOR COURT
FOR GADSDEN COUNTY
QUINCY, FLORIDA

Re: Warrant No. ———

ROBERT DEAN DICKEY

vs.

STATE OF FLORIDA

Motion for Speedy Trial or, in the alternative, Dismissal of Warrant No. ——— represents as follows:

1. That there is pending in this court a warrant No. ——— charging petitioner with Armed Robbery.
2. That the petitioner is confined in the United States Penitentiary at Leavenworth, Kansas for a term of 15 years.
3. That petitioner will not be released until 1971.
4. That the petitioner presently has a valid defense to the charge contained in the foresaid warrant and is ready for trial.
5. That the witnesses now available for the petitioner's defense may not be available at some future date.
6. That the petitioner cannot safely go to trial without the witnesses for his defense and will not enjoy *Due Process of Law* if he is deprived of his defense witnesses by reason of the State of Florida's delay in bringing him to trial.
7. That under existing Federal Law and upon proper application by the authorities of the State of Florida, the petitioner is now available to the jurisdiction of this court for the limited purposes of affording him his Constitutional Rights to a Speedy Trial.

MEMORANDUM OF LAW IN SUPPORT OF THE MOTION

The petitioner is guaranteed a speedy trial by the Constitution of the *United States and the State of Florida.* The Sixth Amendment is binding on the State Courts by provisions of the Fourteenth Amendment of the Federal Constitution. While one in prison need not

make a demand for a speedy trial (*22 C.J.S. Criminal Law 467, p. 716*), a formal demand raises a bar to subsequent prosecution. *Pietch* vs. *United States*, 10 Cir. 1940, 110 F. 2d 817.

See *Harrell* vs. *State*, 41 Okl. Cr. 350.227, p. 1038.

There is available to the District Attorney of Gadsden County, State of Florida, a process for obtaining the limited custody of the petitioner for the purpose of affording him a speedy trial. Application must be made to United States District Chief Judge G. Harrold Carswell, Tallahassee, Florida for a writ of habeas corpus ad prosequendum (state writ), Section 2241(5), Title 28 USC. This procedure will produce the petitioner for the limited purpose of affording him a trial on the State charge pending in Gadsden County, Florida. This procedure has been approved by the United States Supreme Court: *Ponzi* vs. *Fessenden*, 258 U.S. 254, 265-266, 42 S. Ct. 309, 212. See also the recent case of *Taylor* vs. *United States*, 1958 238 F. 2d 259.

Upon application for a speedy trial it has been held neglect by official duty such to deny an application, *State* vs. *Dewey*, 73 Kansas 735, 88 p. 881-882; *State* vs. *Sims*, 1 Tenn. 253; in *Fouts* vs. *United States*, 253 F. 2d 215, that court held:

> "It is established that the accused does not forfeit his rights to a speedy trial solely because of his being confined in a penitentiary."

And the accused is entitled to dismissal for denial of due process. *State* vs. *Carrille*, 41 Ariz. 170 16 P. 2965;
State vs. *Brodie*, 7 Wash. 442, 35 P. 137.
Newlin vs. *People*, 221, Ill. 106, 77 N.E. 529;
Keller vs. *State*, 185 N.E. 417 Ohio S. Ct. 342;
Shafer vs. *States*, 183 N.E. 774, 43 Ohio App. 493;
Frankel v. *Woodrough*, C.C.A. Neb. 7 F. 2d 796.
In the case of *White*, 1928, 264 P. 647, 39 Akl. Cr. 242 was ruled:

> "Federal prisoners with the United States Attorney General's consent may be taken on habeas corpus ad prosequendum into State Court, regardless of lack of express statute."

The petitioner by his sworn statements has raised the issue that if he is not brought to trial forthwith he will be unable to get a fair trial on the warrant pending against him in Gadsden County, State of Florida.

It is of public interest that he be given a fair trial and it is of interest to the State of Florida that the case be disposed of according to law and justice, and for these reasons the motion should be granted as a denial of the motion will set a bar to any subsequent prosecution under the said warrant. The issue that the petitioner cannot receive a fair trial will be raised on any extradition proceedings the State of Florida may institute at any subsequent time to obtain custody of petitioner.

WHEREFORE, the petitioner respectfully prays this court to issue an order directing the District Attorney of Gadsden County, State of Florida, to take the necessary steps to obtain the custody of petitioner for the limited purpose of affording him a speedy trial contained in the charge of the warrant against him, or in the alternative, that the aforesaid warrant be dismissed for lack of prosecution no later than the next term of this court.

Respectfully submitted,

/s/ Robert Dean Dickey
ROBERT DEAN DICKEY
80533, Box 1000
Leavenworth, Kansas 66048

STATE OF KANSAS

ss

COUNTY OF LEAVENWORTH

Subscribed and sworn to before me this 28th day of March, 1966.

/s/ [Illegible]
U. S. Parole Officer

Authorized by the Act of July 7, 1955 to administer oaths (18 U.S.C. 4004).

[Proof of Service (Omitted in Printing)]

IN THE CIRCUIT COURT
OF THE SECOND JUDICIAL CIRCUIT
IN AND FOR GADSDEN COUNTY, FLORIDA

ROBERT DEAN DICKEY

vs.

STATE OF FLORIDA

The subject matter of the petition filed herein by the defendant, Robert Dean Dickey, has already been disposed of by prior order of this Court dated December 1, 1962.

Done at Quincy, Florida this 13th day of April, A.D. 1966.

/s/ Hugh M. Taylor
Circuit Judge

IN THE CIRCUIT COURT
OF THE SECOND JUDICIAL CIRCUIT
IN AND FOR GADSDEN COUNTY, FLORIDA

ROBERT DEAN DICKEY, PETITIONER

vs.

WILLIAM D. HOPKINS, State Attorney,
Gadsden County, Florida, RESPONDENT

PETITION FOR DISMISSAL—September 1, 1967

Comes now Petitioner Robert Dean Dickey, Pro Se, and respectfully moves the court for an order commanding the respondent to dismiss and withdraw detainer of warrant lodged against petitioner for the following reasons.

1. On June 14, 1967 the Supreme Court of Florida, Case No. 35,418, entitled Robert Dean Dickey vs. Circuit

Court, Gadsden County, Quincy, Florida, ruled that petitioner herein had been denied a speedy trial as afforded by the Sixth Amendment to the United States Constitution and Chapter 915, F-S- which is designed to implement the right of speedy trial guaranteed by Section 11, Declaration of Rights, Florida Constitution (See: Exhibit A attached).

2. In conforming with said ruling of the Supreme Court of Florida, Petitioner herein states:

A. Petitioner is a United States Prisoner under the legal custody of the United States Attorney General, and presently imprisoned in the U. S. Penitentiary, Leavenworth, Kansas.

B. Petitioner is presently serving three (3) consecutive sentences of five (5) years and his tentative expiration date is *January, 1971.*

C. The nature of the charge pending against petitioner to the best of his knowledge, is armed robbery. Which charge is pending in this circuit court Gadsden County, Florida and was filed on or about the 28th day of June 1960.

D. The Respondent has caused a detainer warrant to be filed against Petitioner herein, with the Sheriff of Leavenworth County, Kansas and with the Warden of said U.S. Penitentiary, Leavenworth, Kansas, where he is being held.

E. Petitioner has requested of the respondent on *29th day of October 1962* that he be given a Speedy Trial and again on *April 1, 1963* and on the *28th day of March 1966* he requested this court to direct the respondent to furnish him with a Speedy Trial, which requests, motions and petitions were all denied.

Because the Supreme Court of Florida ruled in Dickey v. Circuit Court, Gadsden County, Quincy, Florida, Supra, that:

> In summary we here hold that one who is held in custody by another sovereign and who is also accused of a crime in this state, as a result of which a detainer warrant has been lodged against the accused, the accused has the constitutional right to

demand that Florida initiate the procedure available to it to secure the return of the accused here for a speedy trial. . . . (Exhibit A, Page 12).

Petitioner again, herein prays, that this Honorable Court will direct the respondent herein to remove and dismiss the detainer warrant pending against him from Gadsden County, Quincy, Florida. As his Constitutional Right to a Speedy Trial has been denied him by laches of the respondent herein, and will ever pray.

DATED September 1st 1967.

STATE OF KANSAS)
) SS
COUNTY OF LEAVENWORTH)

Respectfully Submitted,

/s/ Robert D. Dickey
ROBERT DEAN DICKEY
80533
Leavenworth, Kansas

Subscribed and sworn to before me this 1st day of September 1967.

/s/ A. T. Miller
A. T. MILLER
Class. & Parole

"Authorized by the Act of July 7, 1955 to administer oaths (18 U.S.C. 4004)."

[Proof of Service (Omitted in Printing)]

IN THE CIRCUIT COURT
OF THE SECOND JUDICIAL CIRCUIT
IN AND FOR GADSDEN COUNTY, FLORIDA

THE STATE OF FLORIDA

vs.

ROBERT DEAN DICKEY, DEFENDANT

ORDER FOR WRIT OF HABEAS CORPUS AD PROSEQUENDUM—December 15, 1967

This matter coming on before me this day, ex parte, upon the Petition of the State of Florida for a Writ of Habeas Corpus Ad Prosequendum as to the above named defendant, and the Court being advised in the premises, it is, therefore

ORDERED that the Clerk of this Court be, and he is hereby, directed to issue a Writ of Habeas Corpus Ad Prosequendum to the Warden, United States Penitentiary, Leavenworth, Kansas and the United States Marshal, Northern District of Florida and/or his deputies, to cause the said defendant presently confined in that institution to be brought before this Court at Quincy, Florida at ten o'clock, A. M., on the 23rd day of January, A. D., 1968, at the expense of the State of Florida and/or Gadsden County, Florida, and thereafter the defendant to be returned to the custody of said Warden as soon as he has been excused.

DONE and ORDERED this 15th day of December, A. D., 1967.

/s/ [Illegible]
Circuit Judge

IN THE NAME AND BY THE AUTHORITY
OF THE STATE OF FLORIDA

In the Circuit Court of the Second Judicial Circuit of the State of Florida, for GADSDEN County, in the year of our Lord One Thousand Nine Hundred and SIXTY SEVEN,

BE IT REMEMBERED, That William D. Hopkins, State Attorney for the Second Judicial Circuit of the State of Florida, prosecuting for said State, being present in said Court on the 15th day of December, 1967, gave the court to be informed and understand that, ROBERT DEAN DICKEY late of the County of Gadsden, in the Circuit and State aforesaid, on the 28th day of June in the year of our Lord One Thousand Nine Hundred and Sixty, in the County of Gadsden aforesaid, did then and there by force, violence or assault, or putting in fear, feloniously rob, steal and take away from the person or custody of Mrs. Ralph Clark certain property then and there the subject of larceny, to-wit: United States Currency or money of the value of $40.00 of the property, goods and chattels of Clarks Motor Court, a better description thereof being to your informer unknown;

THAT Deputy Robert Martin did on the 1st day of July, 1960 appear before the Honorable A. B. Blackburn, Justice of the Peace, First District, Gadsden County, Florida, and did make affidavit charging said defendant ROBERT DEAN DICKEY with Robbery, copy of such Affidavit being attached hereto and made a part of this Information;

THAT pursuant to the filing of said Affidavit and based thereon the Honorable A. B. Blackburn as Justice of the Peace, First District, Gadsden County, Florida, issued a Warrant under seal of the Justice of the Peace charging said ROBERT DEAN DICKEY with the offense of Robbery, copy of said Warrant being attached hereto and made a part of this Information; and did on July 1, 1960 deliver said warrant to the Sheriff of Gadsden County, Florida for service;

against the form of the statute in such case made and provided, to the evil example of all others in the like case of offending, and against the peace and dignity of the State of Florida.

/s/ William D. Hopkins
State Attorney for the Second Judicial Circuit of the State of Florida, prosecuting for said State aforesaid.

STATE OF FLORIDA)
) ss.
COUNTY OF GADSDEN)

Personally appeared before me, William D. Hopkins, State Attorney for the Second Judicial Circuit of Florida, who being first duly sworn says that the allegations set forth in the foregoing information are based upon facts that have been sworn to as true, and which if true would constitute the offense therein charged.

Sworn and subscribed to before me this 15th day of December A. D., 1967

/s/ William D. Hopkins
State Attorney

/s/ Edwin Baur
Clerk of Circuit Court [SEAL]
Gadsden County

Arraigned _____ Plead _____

SENTENCE _____

_____

_____

IN CIRCUIT COURT
GADSDEN COUNTY, FLORIDA

THE STATE OF FLORIDA

vs.

ROBERT DEAN DICKEY

INFORMATION FOR ROBBERY

67-19-138.

Filed in Court Dec 15 1967, Edwin Baur,
Clerk of Circuit Court

STATE WITNESSES

Mrs. Ralph Clark
Deputy Robert Martin

AFFIDAVIT

IN JUSTICE OF PEACE COURT
FIRST DISTRICT, GADSDEN COUNTY
STATE OF FLORIDA

STATE OF FLORIDA

vs.

ROBERT DEAN DICKEY

Before me, a Justice of the Peace in and for said County, personally came Robert Martin, who, being duly sworn, says that on the 28th day of June, A. D. 1960, in the County and District aforesaid, one Robert Dean Dickey, did then and there by force, violence or assault or or putting to fear, feloniously rob, steal and take away from the person or custody of Mrs. Ralph Clark, certain property then and there the subject of larceny, to-wit;

United States Currency or money of a value of $40.00, of the property, goods and chattels of Clarks Motor Court; a better description being to your informer unknown, contrary to the statute in such case made and provided, and against the peace and diginity of the State of Florida.

Sworn to and subscribed before me this 1st day of July, 1960

A. B. Blackburn (L.S.)
Justice of the Peace

Signed Robert Martin

State of Florida
Gadsden County

I, A. B. Blackburn Justice of the Peace District One Gadsden County Florida. Certify that the foregoing is a true copy of affidavit filed with me, and that the original of same was signed Robert Martin, on July 1st, 1960 This the 27th day of September 1967

Signed A. B. Blackburn

IN JUSTICE COURT,
FIRST DISTRICT,
GADSDEN COUNTY,
STATE OF FLORIDA

STATE OF FLORIDA

vs.

ROBERT DEAN DICKEY

AFFIDAVIT

For Armed Robbery

A. B. BLACKBURN
Justice of the Peace.

IN THE CIRCUIT COURT
OF THE SECOND JUDICIAL CIRCUIT
IN AND FOR GADSDEN COUNTY, FLORIDA

Case No.

STATE OF FLORIDA

v.

ROBERT DEAN DICKEY, DEFENDANT

MOTION FOR CONTINUANCE—January 30, 1968

Comes now the defendant by his undersigned attorney and moves this Court for continuance of the above styled cause set for trial on Wednesday, January 31, 1968. In support of said motion, defendant would show as follows:

1. That two essential witnesses are absent, to wit: A. C. Bud Strickland, whose last known address was Veterans' Administration Hospital, Lake City, Florida, and E. D. Dolan, whose last known address was 9955 Bradley Road, Jacksonville, Florida.

2. The facts expected to be proved by the witness Strickland: The witness will state that he knew and saw defendant on the date of the alleged offense, June 28, 1960, in Waycross, Georgia, thus establishing defendant's alibi that he was not in Quincy, Florida, on the date of the alleged offense and that in truth and fact he was in Waycross, Georgia.

3. The facts expected to be proved by the witness Dolan: He had come into Clark's Motor Court on several occasions with defendant in the course of their employment. Thus Mrs. Clark had seen defendant on several occasions prior to the alleged robbery. Such testimony would, therefore, corroborate the purported testimony of defendant that he would not have robbed Mrs. Clark since she in fact knew and could have recognized him on the date of the alleged offense due to the fact that he had been at Clark's Motor Court on several previous occasions prior to the time of the robbery.

4. The testimony of these witnesses is material and essential and in support of testimony to be given by the defendant, Robert Dean Dickey. Such testimony cannot be proved by any other available witnesses.

5. These witnesses, to the best of affiant's knowledge and belief, are legal residents of the State of Florida.

6. Due diligence has been used to obtain the presence of these witnesses, but service of summons has not been effected upon the witnesses as of the date of this affidavit.

7. These witnesses are not absent through procurement, connivance or consent directly or indirectly either of the applicant or of the defendant to the best of the applicant's knowledge.

8. Applicant believes that this cause cannot be tried with justice to the defendant without the purported testimony of such witnesses.

9. Applicant received information from the defendant that the above two witnesses could testify, if present, in the manner as outlined under paragraphs 2 and 3 above.

10. It is believed that the witnesses will be present at a designated time not later than the next term of court or that their depositions will be obtained.

/s/ Richard W. Ervin, III
RICHARD W. ERVIN, III
Public Defender
Second Judicial Circuit

Sworn to and subscribed before me this 30 day of January, 1968.

/s/ Georgene I. Bradbeck
Notary Public
Notary Public State of Florida at Large
My Commission Expires Aug. 22, 1970
Bonded Through Fred W. Diestelhorst

[Certificate of Service (Omitted in Printing)]

IN THE CIRCUIT COURT
OF THE SECOND JUDICIAL CIRCUIT
IN AND FOR GADSDEN COUNTY, FLORIDA

Case No.

STATE OF FLORIDA

v.

ROBERT DEAN DICKEY, DEFENDANT

MOTION TO QUASH—January 30, 1968

Comes now Robert Dean Dickey, by his undersigned attorney, and moves to quash the information filed against him in the above styled cause on the following grounds:

1. If defendant is tried on the charge now pending against him, it would deny him of his constitutional right to speedy trial as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and Section 11, Declaration of Rights, Florida Constitution. The pleadings attached to the court file herein show that on October 29, 1962, April 1, 1963, and March 28, 1966, defendant requested the State of Florida to give him a speedy trial or to release him. At the time defendant filed said motions, he was in federal custody serving a fifteen year sentence imposed in September, 1960, by the United States District Court for the Northern District of Florida. By orders entered in December, 1962, April, 1963, and April, 1966, Hugh M. Taylor, Judge of the Circuit Court in and for Gadsden County, Florida, denied the relief requested. The offense in the above styled cause is alleged to have occurred June 28, 1960. The case has been set for trial January 31, 1968. Thus seven and one-half years have elapsed between the date of the alleged offense and the date set for trial.

Furthermore, defendant would show that the delay caused by the State's refusal to grant him a speedy trial has prejudiced him in receiving a fair trial since an essential and material witness on defendant's behalf is

now deceased. In support of this allegation, defendant has attached hereto an affidavit showing that Mrs. Hazel Varnadore, 42 East Marion Street, Chattahoochee, Florida, died during the year 1964. If she were living, the said witness would have testified upon information and belief that she was the sister of defendant, that she knew and recognized his voice, and that at approximately 12:15 o'clock a.m. the morning of June 28, 1960, she received a telephone call from defendant from Waycross, Georgia, thus establishing defendant's alibi that he was not in Quincy, Florida, on the date and at the time the alleged offense occurred, thus refuting the purported testimony of Mrs. Ralph Clark, who allegedly will testify that defendant robber her on June 28, 1960, at approximately 2 o'clock a.m. Such evidence then would tend to corroborate defendant's testimony that he was not in the vicinity of Quincy, Gadsden County, Florida, on the date and time alleged. Therefore, for the reasons stated, the State's failure to grant to him a speedy trial is violative of the aforestated provisions of the Florida and United States Constitutions and further it would be prejudicial to cause him to defend the case since an essential witness is now deceased.

2. As a second alternative ground, defendant would show that the offense of armed robbery is alleged to have occurred on June 28, 1960, but that the information was not filed until December 15, 1967. While the information does recite that an affidavit and warrant were issued on July 1, 1960, the return on the warrant does not indicate a date of issuance or delivery. Therefore, the prosecution was not commenced within the statutory time prescribed by law and the information should therefore be quashed.

3. As a third alternative ground for relief, there is attached hereto affidavit of defendant showing that on or about July 1, 1960, he was taken into custody of the United States of America for the offenses of bank robbery which occurred on or about June 17, 1960 and July 1, 1960. The affidavit further shows on its face that defendant was in custody of the United States of America and within the territorial boundaries of the State

of Florida awaiting the disposition of federal criminal charges against him from on or about the first day of July, 1960 until September 12, 1960. The information states on its face that the arrest warrant was issued July 1, 1960. Thus there was ample time for the State of Florida, if it so wished, to have arrested defendant on the said charges of armed robbery and to have commenced prosecution against defendant before he was transferred from the territorial confines of the State of Florida. To delay the cause thereby was prejudicial to the defendant and was a denial of his constitutional right to a speedy trial.

/s/ Richard W. Ervin, III
RICHARD W. ERVIN, III
Public Defender
Second Judicial Circuit
Attorney for Defendant

[Certificate of Service (Omitted in Printing)]

IN THE CIRCUIT COURT
OF THE SECOND JUDICIAL CIRCUIT
IN AND FOR GADSDEN COUNTY, FLORIDA

Case No.

STATE OF FLORIDA

v.

ROBERT DEAN DICKEY, DEFENDANT

AFFIDAVIT—Filed January 31, 1968

STATE OF FLORIDA
COUNTY OF GADSDEN

Before me, the undersigned authority, personally appeared Robert Dean Dickey, who, being by me first duly sworn, deposes and says:

1. That he is the defendant in the above styled cause.
2. That the offense filed against him is alleged to have occurred on June 28, 1960.
3. That he has filed motions before this Court on October 29, 1962, April 1, 1963, and March 28, 1966, requesting that the State of Florida give to him a speedy trial.
4. That defendant would have subpoenaed to testify in his behalf at the time of the trial set for January 31, 1968, Mrs. Hazel Varnadore, 42 East Marion Street, Chattahoochee, Florida, who died during the year 1964.
5. Affiant avers that the testimony of Mrs. Varnadore was essential and material to a proper defense of this cause for the following reasons:

(a) It is believed that the State's primary witness, Mrs. Ralph Clark, will testify that defendant robbed her in the early morning of June 28, 1960, at approximately 2 o'clock a.m.

(b) Mrs. Varnadore would have testified that she had known defendant for a long period of time, that she knew his voice, and that at approximately 12:15 a.m. on the

morning of June 28, 1960, she received a telephone call from defendant from Waycross, Georgia.

(c) This testimony would therefore corroborate defendant's testimony that he was not in the vicinity of Quincy, Gadsden County, Florida, on the date and time of the alleged robbery.

6. Defendant further avers that on or about July 1, 1960, he was taken into the custody of the United States of America for offenses of bank robbery. Defendant was in the custody of the United States within the territorial boundaries of the State of Florida awaiting disposition of federal criminal charges against him on or about the first day of July, 1960 until September 12, 1960. Thus there was ample time for the State of Florida, if it so wished, to have delivered any arrest warrant alleged to have been issued on July 1, 1960, prior to his removal from the State of Florida to serve a 15 year sentence for two counts of bank robbery and one count of escape, which sentence has not yet expired.

/s/ Robert D. Dickey
ROBERT DEAN DICKEY

Sworn to and subscribed before me this 31 day of January, 1968.

/s/ Edwin Baur,
Clerk Circuit Court
Gadsden County, Florida
By Oma M. Hathcock,
Deputy Clerk

IN THE CIRCUIT COURT
OF THE SECOND JUDICIAL CIRCUIT
IN AND FOR GADSDEN COUNTY, FLORIDA

Case No.

STATE OF FLORIDA

v.

ROBERT DEAN DICKEY, DEFENDANT

SECOND MOTION FOR CONTINUANCE—February 12, 1968

Comes now the defendant by his undersigned attorney and moves this Court for continuance of the above styled cause set for trial on Tuesday, February 13, 1968. In support of said motion, defendant would show as follows:

1. That an essential witness, A. C. Bud Strickland, whose last known address is Savannah, Georgia, is absent.

2. The facts expected to be proved by the witness: The witness will state that he knew and saw defendant on the date of the alleged offense, June 28, 1960, in Waycross, Georgia, thus establishing defendant's alibi that he was not in Quincy, Florida, on the date of the alleged offense and that in truth and fact he was in Waycross, Georgia.

3. The testimony of this witness is material and essential and in support of testimony to be given by the defendant, Robert Dean Dickey. Such testimony cannot be proved by any other available witness.

4. Due diligence has been used to obtain the presence of this witness, but service of summons has not been effected upon the witness as of the date of this affidavit.

5. This witness is not absent through procurement, connivance or consent directly or indirectly either of the applicant or of the defendant to the best of the applicant's knowledge.

6. Applicant believes that this cause cannot be tried with justice to the defendant without the purported testimony of such witness.

7. Applicant received information from the defendant that A. C. Bud Strickland can testify in the matter as outlined under paragraph 2 above.

8. It is believed that the witness will be present at a designated time not later than the next term of court or that his deposition will be obtained.

/s/ Richard W. Ervin, III
RICHARD W. ERVIN, III
Public Defender
Second Judicial Circuit
Attorney for Defendant

Sworn to and subscribed before me this 12th day of February, 1968.

/s/ Georgene I. Bradbeck
Notary Public
Notary Public State of Florida at Large
My Commission Expires Aug. 22, 1970
Bonded Through Fred W. Diestelhorst

[Certificate of Service Omitted in Printing]

IN THE CIRCUIT COURT
OF THE SECOND JUDICIAL CIRCUIT
IN AND FOR GADSDEN COUNTY, FLORIDA

Case No.

STATE OF FLORIDA

v.

ROBERT DEAN DICKEY, DEFENDANT

ORDER DENYING MOTION TO QUASH—February 13, 1968

This cause coming on before me on defendant's Motion to Quash, all grounds alleged therein being carefully considered by the Court, and hearing having been held thereon, it is hereby

ORDERED AND ADJUDGED that defendant's Motion to Quash be denied.

DONE AND ORDERED this 13th day of February, 1968.

/s/ Guyte P. McCord, Jr.
GUYTE P. MCCORD, JR.
Circuit Judge

[fol. 56]

EXCERPTS FROM TRANSCRIPT OF TESTIMONY

Q Is that the only change?

A And he's wearing glasses and he's put on a little weight and his complexion is a lot lighter than it was then.

Q Will you tell me again, now, the exact description that you gave Deputy Martin when you reported the robbery?

A I told him that he had on sport clothes. I think the pants were gray and this checked shirt or plaid shirt, whichever you want to call it, and that it was cut straight around the bottom and it was not tucked into his pants. It was hanging on the outside.

Q What else?

A That's all he had on that I saw was the checked shirt and the gray pants.

Q You must have given some more description to Robert Martin.

A I just told him in my mind what he looked like.

Q Well, what did you tell him?

A I told him that I thought he weighed about 165 pounds and that he was between 23 and 26 or 28 years old and I told him he was about 5 feet six inches or something like that, and I told Mr. Martin that I wasn't no judge of height or weight or age and then I just gave him the description.

Q What else did you tell him about him?

A That was all I could tell him about him.

Q Did you tell him about his hair or his eyes?

A I told him that his hair was cut short.

Q And when you say short, you mean shorter than mine?

A Yes.

[fol. 57] Q What color did you say that hair was?

A It was sandy or light colored.

Q And the eyes?

A I told him they were either blue or gray.

Q Did you give any other description to Robert Martin?

A No.

Q That's all you gave to him?

A As best I can remember, that's all I gave him.

Q Had you ever been robbed before, Mrs. Clark?

A No, sir.

Q Had you ever seen Robert Dickey in your place of business before?

A Not to my knowledge. When you work in the office and people are coming and going in the cafe, you can't see everybody that goes in and goes out. Not to my knowledge had I ever seen him there before.

Q Isn't it possible that you could have seen him and then transferred his face to the person who robbed you?

A (Witness shook head negatively.)

MR. BUCHANAN: No further questions.

REDIRECT EXAMINATION

BY MR. MORRISON:

Q I believe you mentioned that some moles had been taken from his face.

A He had some moles, four or five moles on his face, on this side of his face. I noticed that specifically while I was giving him the money. He had one along here and he had * * *

* * * *

[fol. 62] * * * whether or not he signed an affidavit has no bearing on this case.

THE COURT: Objection overruled.

Q Who did you sign an affidavit before?

A I signed the affidavit before Judge A. B. Blackburn, Justice of the Peace of the First District of Gadsden County.

Q Now, what did you sign an affidavit charging the defendant with?

A Robbery.

Q Do you know if a warrant was issued?

A Yes, sir.

MR. MORRISON: No further questions.

CROSS EXAMINATION

BY MR. BUCHANAN:

Q Deputy Martin, I believe the robbery occurred about 2:00 a.m. on June 28, 1960. Is that right?

A Yes, sir.

Q And Mrs. Clark called you and you responded immediately?

A Yes, sir.

Q What description did she give you of the man who held her up?

A She said that he was a little fellow and he had his hair cut short and kind of combed back and she said he had some moles on his face and she said that he wasn't too tall.

Q Did she tell you whether his hair was black or not?

A She did not say. She said he had dark hair.

[fol. 63] Q Dark hair?

A Yes, sir.

Q All right, how about his weight? What did she say about his weight?

A I don't remember whether she even gave his weight or not. She just said that he was kind of short and chunky.

Q All right, did she say that his hair was combed back?

A Said it was combed back, yes, sir.

Q Was it longer than mine?

A No, I wouldn't say it was longer than yours, the way she described it, but that it would be longer than his is now.

Q It was longer than his now?

A Right.

Q Now, did she describe his clothes?

A I don't remember whether she did or not.

Q You do not remember whether she described his clothes or not?

A She probably did but I don't remember.

Q How about his age, she never told you about his age?

A She could have but I don't remember.
Q What about his eyes?
A I don't know.
Q She didn't tell you about that?
A She could have and I'm not going to say she didn't.
Q You can't remember?
A No, I don't remember her saying about his age. [fol. 64] She most likely did, though.
Q Did you have your notes there or did you take any notes as to the description of the robber?
A I did.
Q Where are those notes?
A I don't know, sir. That has been a long time ago.
Q Well, are they destroyed or what?
A I imagine I throwed them away.
Q When did you throw them away, do you know?
A After he went off. I didn't know whether we would ever have him back here again or not.
Q Those notes would have been important for you to refresh your memory from, wouldn't they?
A I used the notes to put the description out on the radio and that's all.
Q So the notes probably indicated much better what—
A They would indicate exactly what she told me but I don't have them so I'm not going to tell you something that I'm not positive of.
Q So what you're saying is that after an eight year period it's difficult to recall what she told you?
A Well, all of it, yes, sir. I do recall some of it, though.
Q Okay, now I believe you brought her some pictures over from Tallahassee. Is that right?
A Yes, sir.
Q And these were for her to identify?

* * * * *

[fol. 67]

* * * I had told her.
Q And you all were letting her walk down the aisle?

A She was stopping in front of each cell and when she got to the cell where he was, she had looked at everyone of them, and she said that was him.

Q She had already seen the picture of Dickey before she went over there?

A Oh, yes.

Q Now, I believe you went into the affidavit, Deputy Martin. You went to Mr. Blackburn and executed an affidavit. Is that correct?

A An affidavit and a warrant.

Q And he issued you a warrant for his arrest, for Dickey's arrest?

A There were two affidavits and a warrant that he issued. I signed the two affidavits and there was a warrant, too.

Q When did you get that warrant?

A It was after she went over there and identified him.

Q That would have been around July 1, 1960, wouldn't it?

A I believe it was that Friday after I came back from over there when we went over and she identified him.

Q Now, did you ever execute that warrant?

A We sent it off to Atlanta.

Q When?

A Whenever he went to prison up there.

Q Wasn't it true that Dickey was in the State of Florida from * * *

* * * *

IN THE DISTRICT COURT OF APPEAL
FIRST DISTRICT, STATE OF FLORIDA
JULY TERM, A. D. 1968

Case No. K-193

ROBERT DEAN DICKEY, APPELLANT

vs.

STATE OF FLORIDA, APPELLEE

NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING PETITION AND DISPOSITION THEREOF IF FILED.

OPINION—filed November 21, 1968

An Appeal from the Circuit Court for Gadsden County. Guyte P. McCord, Judge.

Richard W. Ervin, III, Public Defender; and John D. Buchanan, Jr., Assistant Public Defender, for Appellant.

Earl Faircloth, Attorney General; and George R. Georgieff, Assistant Attorney General, for Appellee.

PER CURIAM

This cause having been orally argued before the court, the briefs and record on appeal having been read and given full consideration, and appellant having failed to demonstrate reversible error, the judgment of the lower court hereby appealed is affirmed. See Dickey v. Circuit Court, (Fla. 1967) 200 So. 2d 521.

WIGGINTON, CHIEF JUDGE, CARROLL, DONALD K., and RAWLS, JJ., Concur.

[Clerk's Certificate Omitted in Printing]

SUPREME COURT OF THE UNITED STATES

No. 51 Misc., October Term, 1969

ROBERT DEAN DICKEY, PETITIONER

v.

FLORIDA

ON PETITION FOR WRIT OF CERTIORARI TO THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA, FIRST DISTRICT.

On consideration of the motion for leave to proceed herein *in forma pauperis* and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed *in forma pauperis* be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby, granted. The case is transferred to the appellate docket as No. 728 and placed on the summary calendar.

October 13, 1969

☆ U. S. GOVERNMENT PRINTING OFFICE: 1969 370418 361

FILE COPY

Office-Supreme Court, U.S.
FILED
DEC 22 1969
JOHN F. DAVIS, CLERK

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1969

No. 728

TITION NOT PRINTED

PONSE NOT PRINTED

ROBERT DEAN DICKEY,

Petitioner,

vs.

FLORIDA,

Respondent.

ON WRIT OF CERTIORARI TO THE DISTRICT COURT OF APPEAL OF FLORIDA, FIRST DISTRICT

BRIEF FOR THE PETITIONER

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BRIEF FOR THE PETITIONER

Opinions Below

The opinion of the District Court of Florida, First District, is reported in 215 So.2d 772 (1968).

Jurisdiction

After conviction, petitioner filed a direct appeal to the Florida District Court of Appeal, First District, challenging the denial by the trial court of petitioner's Motion to Quash, based upon the Sixth and Fourteenth Amendments to the United States Constitution. Petitioner's claim under the Sixth and Fourteenth Amendments was properly pre-

sented (S.* K), and was denied by the Florida District Court of Appeal, First District, on November 21, 1968 (A. 46). The Petition for a Writ of Certiorari was filed February 18, 1969, and was granted October 13, 1969. The jurisdiction of this Court rests on 28 U.S.C., Section 1257 (3).

Constitutional Provisions and Statutes Involved

The Sixth Amendment provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defence.

Section One of the Fourteenth Amendment provides:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

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* S. refers to Stipulation of Facts found in Appendix "A."

Questions Presented

1. Was petitioner denied the right to speedy trial as guaranteed by the Sixth Amendment in conjunction with the Fourteenth Amendment when he was tried eight years later, during which time witnesses could not be located, others had died, and evidence was destroyed?

2. Does the Constitution require dismissal of a state criminal charge for the state's failure to grant a person a speedy trial?

Statement of the Case

The present case arises out of a charge of robbery for which the petitioner was tried and convicted on February 13, 1968. A direct appeal was taken to the Florida District Court of Appeal, First District, on the denial of petitioner's Motion to Quash the Information (S. K). The appeal was denied by the Florida District Court of Appeal, First District, on November 21, 1968 on all issues raised (A. 46).

On July 1, 1960, a deputy sheriff filed an affidavit, charging petitioner with robbery of Clark's Motor Court, Gadsden County, Florida, on June 28, 1960 (S. A). The same date, the Justice of the Peace issued a warrant for petitioner's arrest and placed the warrant in the deputy sheriff's hands (A. 3). Petitioner was being held in the Jackson County, Florida Jail on federal charges for robbery (S. D). The Jackson County Jail is in a county which is adjacent to Gadsden County, Florida. Petitioner was in Florida from July 1, 1960 until September 2, 1960, when he was removed from the State of Florida to a federal penitentiary (S. D).

On July 1, 1960, the petitioner was identified in the Jackson County Jail by an eyewitness in the presence of the deputy sheriff who had executed the affidavit. The Jackson County jailer was present when petitioner was identified (S. I). On September 2, 1960, the Sheriff of Gadsden County filed a detainer with federal authorities in Atlanta, Georgia, charging petitioner with robbery (S. E). From September, 1960 until January 23, 1968, petitioner was held in federal custody, but was returned to Florida on January 23, 1968 for trial (S. E). On October 29, 1962, while in federal custody, petitioner filed a Writ of Habeas Corpus Ad Prosequendum, requesting a speedy trial on the charges or requesting that the detainer be dropped by Florida (A. 6). The court denied the Writ on December 1, 1962 (A. 12). Subsequent writs were filed on April 1, 1963 and March 28, 1966 (A. 14, 20). All were denied by the court (A. 19, 23). Petitioner filed an original mandamus proceeding in the Florida Supreme Court; and the Florida Supreme Court, in an opinion dated June 14, 1967, held that the State should drop the detainer or return petitioner to Flordia for trial, *Dickey* v. *Circuit Court,* 200 So.2d 521 (1967). Petitioner was given leave to file a new writ. On September 1, 1967, petitioner filed a motion that charges be dismissed against him on the basis of denial of a speedy trial (A. 23). The prosecuting attorney, on December 15, 1967, obtained an ex parte order allowing the petitioner to be returned to Florida from federal custody on January 23, 1968 for the charge of robbery (A. 26). On January 23, 1968, the Public Defender was appointed to represent petitioner, whose trial was then scheduled for January 31, 1968 (S. G). On January 30, 1968, petitioner moved to quash the information on two grounds: (1) he was denied the right to a speedy trial

under the Sixth Amendment, and (2) the Florida statute of limitations had run (A. 33). This motion was denied by the court on February 13, 1968 (A. 40). Petitioner filed a Motion for Continuance on January 30, 1968, alleging inability to locate two defense witnesses (A. 31). The motion was granted (S. L). The trial was rescheduled for February 13, 1968, and a second Motion for Continuance was filed February 12, 1968, alleging defense witness could not be found (A. 38). The court denied this motion, and ordered petitioner to trial on February 13, 1968 (S. H).

During the trial, the eyewitness to the robbery testified as to petitioner's description from memory of eight years earlier (A. 41-42), as did the deputy sheriff (A. 43-45). The deputy sheriff wrote down the description given to him by the eyewitness, but admitted destroying those notes several years later (A. 44).

The petitioner was convicted and sentenced to ten years in the Florida Penitentiary, the sentence to run consecutively to existing sentences (S. J). Petitioner alleged error to the Florida District Court of Appeal for denying petitioner's Motion to Quash for lack of speedy trial, based on the Sixth and Fourteenth Amendments to the United States Constitution. The District Court of Appeal affirmed the conviction (A. 46).

The petitioner's Writ of Certiorari was filed in this Court on February 18, 1969. On October 13, 1969, the Court granted the Motion for Leave to Proceed in Forma Pauperis and granted petitioner's Writ of Certiorari (A. 47).

Summary of Argument

1. A state charge had been pending against petitioner since 1960. He was tried and convicted in 1968. The State had failed to try him between 1960 and 1968 because he was confined in a federal penitentiary. Petitioner had filed written requests in 1962, 1963, and 1966 that the detainer be dropped or that he be returned to Florida for trial. All requests were denied until the Florida Supreme Court on June 14, 1967 ordered that petitioner be tried or that the detainer be dropped. The petitioner was returned to Florida on January 23, 1968 to stand trial for the robbery charges. Prior to trial, petitioner moved to quash the information on the basis he was denied the right to a speedy trial because of the eight year delay. The motion was denied by both the trial and the appellate courts.

2. Florida has never applied the right to speedy trial to those incarcerated outside the state who have Florida charges pending against them. Florida had laws on its books (915.01 and 915.02, F.S.*) which would permit the accused to demand a speedy trial if no statutory excuse existed.

Florida did not lack the authority to return petitioner for trial because statutory and case decisions clearly held that a state could obtain a prisoner held in federal custody for trial on state charges. The State's delay in trying petitioner was oppressive and vexatious, and no excuse existed for the delay in trial.

There has been a split of authority as to when the right to speedy trial attaches. Some jurisdictions have held

* F.S. denotes Florida Statutes.

this right begins at the commencement of the prosecution. Other jurisdictions hold this right begins when the indictment or information has been filed. The right to a speedy trial should apply at the commencement of prosecution since the statutes of limitations are not uniform in all jurisdictions. Also the statutes of limitations do not deal with the element of unnecessary delay.

3. The delay in trying petitioner for eight years resulted in prejudice to petitioner's defense because a witness had died, another could not be located, and some evidence was destroyed. Where prejudice to the defense occurs after long delay, this is sufficient to dismiss the charges based on the proposition that the accused was denied a right to speedy trial. Both federal and state courts have followed this principle. Another reason why long delay is bad is because it is detrimental to the guilt determination process regardless of which side secures the advantage. This principle was recognized in *United States* v. *Chase,* 135 F.Supp. 230 (N.D. Ill. 1955).

In addition to the accused and the state, the community has an interest in early trials. Otherwise, the deterrent effect of conviction is lost. The burden should be on the state to show no prejudice as a result of undue delay because the accused probably would not be in a position to prove factors needed to show prejudice. Some jurisdictions have recognized that the burden to show prejudice should be on the prosecution.

4. An eight year delay in the trial of petitioner should result in dismissal of the charges and serve as a bar to future prosecution. The A.B.A. has recommended this practice. Petitioner never had a fair trial because of the unnecessary delay.

ARGUMENT

I.

Florida Had a Constitutional Duty to Give Petitioner a Speedy Trial as Required by the Sixth and Fourteenth Amendments to the United States Constitution.

In *Klopfer* v. *North Carolina,* 386 U.S. 213 (1967) it was held that the right to speedy trial was "as fundamental as any of the rights secured by the Sixth Amendment", and was binding on the states. This right has been adopted by the fifty State Legislatures into their constitutions. In *State* v. *Milner,* 149 N.E.2d 189 (1958) the court, in speaking of delay said:

> "'It has always been the policy of our law to guarantee the accused a speedy public trial, since past experience has demonstrated that a prosecution too long delayed often amounts to persecution . . .'". p. 191

Florida adopted the right to speedy trial almost word for word from the United States Constitution. Section 11, Declaration of Rights, Florida Constitution. *McGeachy* v. *State,* 6 So.2d 823 (Fla. 1942). Based upon previous decisions by the Florida courts, this right was to apply only to those individuals within the state. *State* v. *Cooper,* 157 So.2d 875 (Fla. 1963); *Gossett* v. *Harllon,* 195 So.2d 865 (Fla. 1967); *Feger* v. *Fish,* 143 So. 605 (Fla. 1932). Florida had never defined the right to speedy trial for persons charged with a crime who were incarcerated outside Florida until petitioner filed original mandamus proceedings in the Florida Supreme Court, *Dickey* v. *Circuit Court,* 200 So.2d

521 (Fla. 1967). In *Dickey, supra,* the Supreme Court of Florida determined that a person incarcerated outside the state, charged with a Florida crime, was entitled to be returned for trial. The State then had an affirmative duty to accord petitioner the constitutional right to a speedy trial.

It may be argued that prior to the establishment of the principle in *Smith* v. *Hooey,* 393 U.S. 374 (1969), the states lacked constitutional authority to return a person for trial who was incarcerated in another jurisdiction. However, prior to the decision in *Dickey* v. *Circuit Court,* 200 So.2d 521 (Fla. 1967), there was ample authority that a state could return prisoners for trial, particularly where the accused was in federal custody. 18 United States Code 4085; *Ponzi* v. *Fessenden,* 258 U.S. 254 (1922). Decisions prior to *Smith* v. *Hooey, supra,* recognized the doctrine that one sovereign was under a duty to accord an accused the right to trial if the accused were outside the demanding jurisdiction. *People* v. *Bryarly,* 178 N.E.2d 326 (Ill. 1961); *Pellegrini* v. *Wolfe,* 283 S.W.2d 162 (Ark. 1955); *Taylor* v. *United States,* 238 F.2d 259 (D.C. Cir. 1956). Florida also had a statute on its books (941.05, F.S.) providing for the return of a prisoner from another state in order to stand trial.

It has been recognized that in order to secure the right to a speedy trial one must demand this or else it is waived. Note, *The Lagging Right to a Speedy Trial,* 51 Va.L.Rev. 1587, 1601-1610 (1965).

Section 915.02, F.S., is designed to implement the right to speedy trial. However, before 915.02, F.S., becomes operative, such as to require dismissal of the charge, the

accused must have entered three successive demands for trial for three successive terms of court. Once the accused complies with this requirement, the statute requires that the charge be dismissed if he is not brought to trial. *Feger* v. *Fish,* 143 So. 605 (Fla. 1932); *Dickoff* v. *Dewell,* 9 So.2d 804 (Fla. 1942); *Gossett* v. *Hanlon,* 195 So.2d 865 (Fla. 1967). The accused is obligated under 915.01 and 915.02, F.S., to make three separate demands for trial for three successive terms of court to secure a dismissal; if no demand is made, the statutes do not operate. *Kelly* v. *State,* 54 So.2d 431 (Fla. 1951); *Loy* v. *Grayson,* 99 So.2d 555 (Fla. 1957); *Kemp* v. *State,* 177 So.2d 58 (Fla. 1965); *Wilson* v. *State,* 194 So.2d 33 (Fla. 1967); *Ryan* v. *State,* 197 So.2d 37 (Fla. 1967). In *Dickey* v. *Circuit Court, supra,* the opinion is silent as to whether Dickey had waived the constitutional right to a speedy trial.

The demand doctrine would look to the actions of the accused, whereas excusable delay would look to the actions of the court or the prosecutor to determine whether there was denial of the right to speedy trial.

In *Pollard* v. *United States,* 352 U.S. 354 (1957), only those delays which were not "purposeful and oppressive" are excusable. Again, this court in *United States* v. *Ewell,* 383 U.S. 116, 120, 15 L.ed.2d 627 (1966), said that:

> ". . . 'The delay must not be purposeful or oppressive. . . .' '(T)he essential ingredient is orderly expedition and not mere speed.'" p. 631

Eight years' lapse between the charging of petitioner and his trial cannot be justified on grounds of excusable delay. The argument that the federal authorities holding petitioner might not have granted the request of Florida to

try him, was struck down in another Sixth Amendment case, *Barber* v. *Page,* 390 U.S. 719 (1968). This court stated:

> "We start with the fact that the State made absolutely no effort to obtain the presence of Woods at trial other than to ascertain that he was in a federal prison outside Oklahoma." p. 723

Had Dickey been within the borders of Florida, his request for speedy trial would have been sufficient, assuming no excusable statutory grounds existed. See 915.01, F.S. Dickey could have secured a speedy trial even if he had been in a Florida jail on another offense. See 915.02, F.S. It is difficult to determine from *Dickey* v. *Circuit Court, supra,* whether the prosecutor or the lower court was excused for the long delay because of the mistaken belief that no authority existed for Dickey's return and that Dickey's right to speedy trial did not begin until that decision. Yet, the Florida Supreme Court in *Dickey, supra,* recognized that delay could in some cases invalidate a conviction.

> ". . . it follows that failure of the accusing state to so act might well invalidate any judgment ultimately obtained on such charges if the time lapse is sufficiently great and is not excused." p. 526

Apparently, the court, in *Dickey, supra,* was unwilling to find unconstitutional, oppressive or vexatious actions which resulted in delay of the trial to those persons incarcerated outside the borders of Florida.

> "The petitioner on three previous occasions has, by petition lodged with the circuit court in that county, requested that he be brought back for trial on that

charge. We will not in this case go as far as Arkansas would." p. 526

It makes no difference whether the delay was attributable to inaction on the part of the prosecutor or on the part of the lower court. The harm that has been done to the accused because of the unnecessary delay cannot be changed. An unnecessary delay in trial should be unconstitutional when such actions are "purposeful," "arbitrary," or "vexatious" regardless of who is causing the delay. *Klopfer* v. *North Carolina,* 386 U.S. 213 (1967); *United States* v. *Ewell,* 383 U.S. 116, 120, 15 L.ed.2d 627 (1966); *Pollard* v. *United States,* 352 U.S. 354 (1957).

The doctrine of delay by the government has been recognized as a denial of speedy trial. In *Klopfer, supra,* the holding indicates that delaying actions are sufficient to show a denial of speedy trial without the necessity of showing prejudice. In *United States* v. *Provoo,* 17 F.R.D. 183 (D. Md. 1955), the delay was construed to be intentional where the government had sought the wrong venue and petitioner had been in jail over five years. In *Hanrahan* v. *United States,* 348 F.2d 363 (D.C. Cir. 1965) the court, while not reversing the conviction, felt that negligence on the part of the government, resulting in unnecessary delay, might invalidate a trial.

It would seem that "oppressive," "purposeful" or "arbitrary" acts resulting in a long delay should constitute a denial of the constitutional right to speedy trial. If the actions of the respondent resulted in unnecessary delay, a constitutional denial of speedy trial should be afforded Dickey without the showing of any prejudice. It would be quite difficult to say that respondent did everything in its

power to protect the right of speedy trial for Dickey. If the state has the duty to furnish counsel, to advise the accused to remain silent, then the duty exists to speedily try the accused. *Gideon* v. *Wainwright,* 372 U.S. 335 (1963); *Miranda* v. *Arizona,* 384 U.S. 436 (1966).

While most jurisdictions recognize that oppressive and vexatious actions by a prosecutor can result in a denial of speedy trial, there still is conflict as to whether actions by the courts can result in a denial of speedy trial.

The view that court delay is excusable is found in *State* v. *Kuhnhauser,* 272 P.2d 225 (Ore. 1954), involving a six months' delay because of attention to civil cases. The other view that court delay is not excusable is found in *Ex parte Vacca,* 271 P.2d 162 (1964); *People* v. *Echols,* 271 P.2d 595 (1954). Note, *The Right to a Speedy Criminal Trial,* 57 Col.L.Rev. 846, 858 (1957). However, delay by the court has resulted in dismissals. In *Marshall* v. *United States,* 337 F.2d 119 (D.C. Cir. 1964), where a series of long continuances had been granted and there was failure to arrange the court calendar, dismissal was ordered.

A final argument may be raised that the whole question of long delay is moot because the right to speedy trial only attached when the information was filed in December, and the accused was tried approximately three months later.

On July 1, 1960 a warrant was issued by Gadsden County, Florida for petitioner's arrest. Although petitioner was being held on federal charges in an adjoining Florida county during the months of July and August, 1960, the deputy sheriff who had investigated the case, who visited petitioner in jail, and who later obtained the arrest warrant, made no effort whatsoever from July until September,

1960 to execute the warrant. While Dickey was outside the state, the only action taken by respondent was the filing of a detainer with the federal authorities on charges of robbery. From September 1960 until December 15, 1967, respondent took no action with regard to returning petitioner to Florida for trial. During this period, the accused filed three written requests for speedy trial—one in 1962, one in 1963, and another in 1966. Only after original mandamus proceedings in the Florida Supreme Court did respondent obtain an order on December 15, 1967 for petitioner to be returned for trial. On the same day respondent filed an information charging Dickey with a robbery, which occurred on June 28, 1960.

In Florida prosecution for an offense is begun when a warrant is placed in the hands of a proper person for execution. This is done in order to stop running of the statute of limitations. *Rosengarten* v. *State,* 171 So.2d 591 (Fla. 1965).

The argument can be raised that the constitutional right to a speedy trial does not arise until a formal charge by indictment or information has been filed. The period between the arrest and formal charge is governed by the statute of limitations in some states, and is not subject to the constitutional right to a speedy trial. There has been a division of opinion in state and federal jurisdictions on this question. The view that the right to a speedy trial attaches only when a person has been formally charged, has been followed in *Bruce* v. *United States,* 351 F.2d 318 (5th Cir. 1965); *Hoopengarner* v. *United States,* 270 F.2d 465 (6th Cir. 1959); *State* v. *Lee,* 419 P.2d 927 (1966); *Keyes* v. *State,* 202 A.2d 582 (1964); *Harlow* v. *United States,* 301 F.2d 361, 366 (5th Cir. 1962).

The other view that the constitutional right to speedy trial attaches once prosecution is initiated has been followed in some jurisdictions. *Hanrahan* v. *United States*, 348 F.2d 363, 366 (D.C. Cir. 1965); *Foley* v. *United States*, 290 F.2d 562, 565 (8th Cir. 1961); *Gossett* v. *Hanlon*, 195 So.2d 865, 869 (Fla. 1967); *Jacobsen* v. *Winter*, 415 P.2d 297, 300 (Idaho 1966); *State ex rel. Fredenberg* v. *Byrne*, 123 N.W.2d 305, 307 (Wis. 1963).

There should be no distinction between arrest and formal charge in right to speedy trial. Historically, it would seem the right to speedy trial was applicable to include pre-indictment periods.

> "The history of the development of the right strongly indicates that it was not designed solely to protect individuals who had been formally charged with a crime. The first written articulation of the right appeared in 1215 in the Magna Carta: 'We will sell to no man, we will not deny or defer to any man either justice or right.'"

Note, *The Right to a Speedy Trial*, 20 Stan.L.Rev. 476, 483 (1968). If the constitutional right to speedy trial were available only after a formal charge, such situations would invite prosecutors to make a nullity of the right. The withholding of formal charges until the end of the statutory period certainly could induce oppressive and vexatious actions designed to circumvent the constitutional right to speedy trial. Note, *Effective Guaranty of a Speedy Trial for Convicts in Other Jurisdictions*, 77 Yale L.J. 767, 780 (1968). It would be quite easy for an accused to be subject to the limitations the court warned of in *United States* v. *Ewell*, 383 U.S. 116, 120 (1966).

"This guarantee is an important safeguard to prevent undue and oppressive incarceration prior to trial, to minimize anxiety and concern accompanying public accusation and to limit the possibilities that long delay will impair the ability of an accused to defend himself." p. 630

It has been said that procedural safeguards, such as the statute of limitations, take care of the pre-indictment period. The problem of using the statute of limitations or a similar statutory device, as a sole safeguard to protect the accused between the time of arrest and the filing of formal charges, is the lack of uniformity in the states and federal jurisdictions. See the A.B.A. Project, *Standards Relating to Speedy Trial,* pp. 14-16 (Appr. Draft, 1968). The federal statute of limitations for non-capital cases is five years. 18 United States Code 3282. The Florida statute of limitations in non-capital cases is two years. 932.05, F.S. The Presidential Commission on Law Enforcement has proposed the period from arrest to trial on felony charges be not more than four months. See Note, p. 14, A.B.A. Project, *Standards Relating to Speedy Trial* (Appr. Draft, 1968). Such variations of the statute of limitations for both state and federal jurisdictions cannot effectively insure the accused the constitutional right to speedy trial since there is no attempt to distinguish between necessary and unnecessary delay. Note, *The Lagging Right to a Speedy Trial,* 51 Va.L.Rev. 1587, 1614 (1965).

The duty to accord Dickey a speedy trial existed because there was authority whereby he could have been returned to Florida for trial even before pronouncement by this court in *Smith* v. *Hooey, supra.* Petitioner never waived

his constitutional right to a speedy trial because of his written requests. The state's actions can be classified as oppressive and vexatious because no attempt was made to honor petitioner's demands. The state cannot hide behind the act of a late filing of the information to defeat the right to speedy trial.

II.

A Delay of Eight Years in Granting Trial Is Denial of the Right to Speedy Trial as Guaranteed by the Sixth Amendment to the Constitution When the Delay Results in Prejudice to the Accused's Defense and Person.

The issue in this case is whether petitioner was prejudiced by an eight year delay in bringing his case to trial. In *Smith* v. *Hooey, supra,* the question of prejudice was discussed:

> " . . . his ability to confer with potential defense witnesses, or even to keep track of their whereabouts, is obviously impaired. And, while 'evidence and witnesses disappear, memories fade, and events lose their perspective,' a man isolated in prison is powerless to exert his own investigative efforts to mitigate these erosive effects of the passage of time."

In *Dickey, supra,* it is stated:

> " . . . it follows that failure of the accusing state to so act might well invalidate any judgment . . . if the time lapse is sufficiently great. . . ." p. 526

The doctrine of prejudice arising to an accused's defense because of long delay has been widely recognized by both

federal and state decisions. *Williams* v. *United States*, 250 F.2d 19 (1957); *United States* v. *Chase*, 135 F.Supp. 230 (1955); *United States* v. *McWilliams*, 163 F.2d 695 (D.C. Cir. 1947); *United States* v. *Provoo*, 17 F.R.D. 183 (D. Md. 1955); *Needle* v. *Scafati*, 289 F.Supp. 1006 (1968); *Jones* v. *State*, 164 So.2d 799 (Miss. 1964); *State* v. *Milner*, 149 N.E.2d 189 (1958); *Bell* v. *State*, 220 So.2d 287 (Miss. 1969); *People* v. *Bryarly*, 178 N.E.2d 326 (Ill. 1961); *Arrowsmith* v. *State*, 175 S.W. 545 (Tenn. 1915); *United States* v. *Richardson*, 291 F.Supp. 441 (1968). Note, *The Lagging Right to a Speedy Trial*, 51 Va.L.Rev. 1587, 1592, 1593 (1965).

In *Taylor* v. *United States*, 238 F.2d 259 (D.C. Cir. 1956), where there was a four year period between the offense and the indictment plus two years of waiting for trial, the Court stated:

> "... and the resulting handicap to the procurement of witnesses who might have supported appellant's alibi, or any other defense, must seriously have handicapped the preparation of a defense ..." p. 262

In *United States* v. *Ewell*, 383 U.S. 116, 15 L.ed.2d 627 (1966), it was held:

> "... and to limit the possibilities that long delay will impair the ability of an accused to defend himself." p. 630

Smith v. *Hooey*, 393 U.S. 374 (1969), states:

> "Finally, it is self-evident that 'the possibilities that long delay will impair the ability of an accused to defend himself' ..."

Note, *The Lagging Right to a Speedy Trial*, 51 Va.L.Rev. 1587, 1591-94 (1965); Note, *Effective Guaranty of a Speedy Trial for Convicts in Other Jurisdictions*, 77 Yale L.J. 767 (1968).

The constitutional right to speedy trial certainly recognizes that an accused should not be prejudiced in his defense. The deputy sheriff who had written the description given by the eyewitness had destroyed his notes. At trial, the eyewitness to the robbery and the deputy sheriff differed on the description given eight years before. The deputy sheriff testified that he had destroyed the only notes containing the description given him by the eyewitness:

> "Q. Where are those notes?
>
> A. I don't know, sir. That has been a long time ago . . . .
>
> Q. So the notes probably indicated much better what—
>
> A. They would indicate exactly what she told me but I don't have them so I'm not going to tell you something that I'm not positive of.
>
> Q. So what you're saying is that after an eight year period it's difficult to recall what she told you?
>
> A. Well, all of it, yes, sir. I do recall some of it, though." (A. 44)

These notes would have resolved the conflict that arose eight years later at trial. Had the trial been earlier, these notes could have established with certainty the description given by the eyewitness.

If the delay results in material evidence being unavailable to the accused, there is sufficient prejudice to indicate

denial of the right to speedy trial. *United States* v. *Provoo,* 17 F.R.D. 183 (D. Md. 1955); *Jones* v. *State,* 164 So.2d 799 (Miss. 1964); *Taylor* v. *United States,* 238 F.2d 259 (D.C. Cir. 1956). When petitioner was finally allowed to go to trial eight years later, one of his defense witnesses had died, and another could not be located. It is obvious that a delay which would result in a witness being unavailable and memories being dulled because of the passage of time, would prohibit an accused from getting a fair trial. In *United States* v. *McWilliams,* 69 F.Supp. 812 (D.D.C. 1946), the Court said:

> "As in all long delayed cases, . . . the memories of witnesses as to events occurring many years ago are not clear. . . . I do not see how these defendants now can possibly obtain fair trials." p. 815

In *Bell* v. *State,* 220 So.2d 287 (Miss. 1969), the Supreme Court of Mississippi followed the doctrine that there had been prejudice to the defense as a result of long delay when witnesses were missing, another had died, and others were not available for trial. Other jurisdictions have also followed this doctrine that there was a constitutional denial of speedy trial where there was prejudice to the defense as a result of witnesses being either dead or missing, where events occurred years ago, and the witnesses were unable to recall accurately. *United States* v. *McWilliams,* 163 F.2d 695 (D.C. Cir. 1947); *United States* v. *Provoo,* 17 F.R.D. 183, 203 (D. Md. 1955); *United States* v. *Chase,* 135 F. Supp. 230 (N.D. Ill. 1955); *Arrowsmith* v. *State,* 175 S.W. 645 (Tenn. 1915); *State* v. *Milner,* 149 N.E.2d 189 (1958); *United States* v. *Richardson,* 291 F.Supp. 441 (1968).

The delay of trial which has resulted in witnesses being dead or scattered over the country, and the inability

of witnesses to remember facts occurring years ago, all are prejudicial to the defense. It may be argued that these factors could easily have hampered the prosecution just as much as the accused. There is a feeling that after lengthy delay the accused would have the advantage because the prosecution would drop the charges. Note, *Continuances in the Cook County Criminal Courts,* 35 U.Chi. L.Rev. 259, 261-62 (1968). While this may be true in some cases, it is detrimental to the guilt determination process regardless of which side secured the better advantage. In *United States* v. *Chase,* 135 F.Supp. 230 (N.D. Ill. 1955), it was observed:

> "While I have not been informed as to how many of the witnesses are available to either side, it can almost be judicially noticed that the passage of that length of time will have made some of them inaccessible . . . . certainly their memories of those long past events are clouded. They could not be said after that length of time to be testifying to what they remember; they would be recalling something as in a dream, a kind of phantasmagoria, rather than an independent recollection. . . . Witnesses, however honest, could not respond with any accuracy to cross-examination, and another important right would thus be lost to petitioner." p. 233

Besides the proposition that both defense and prosecution want a fair trial, the fact is that the community has a vital interest in a speedy trial. A.B.A. Project, *Standards Relating to Speedy Trial* (Appr. Draft, 1968), states at pp. 10-11:

> "From the point of view of the public, a speedy trial is necessary to preserve the means of proving the

charge, to maximize the deterrent effect of prosecution and conviction, and to avoid, in some cases, an extended period of pretrial freedom by the defendant during which time he may flee, commit other crimes, or intimidate witnesses."

Detainers, too, have been recognized as creating prejudice to a prisoner, and as such are within the protection of the Sixth Amendment. Detainers have resulted in confinement in maximum security, loss of prison privileges, loss of desirable jobs, loss of right to honor farm, inability to keep track of the charges, inability to secure evidence in one's favor. Certainly, having a detainer against him for eight years worked unnecessary hardships on Dickey. Schindler, *Interjurisdictional Conflict and the Right to a Speedy Trial,* 35 U.Cin.L.Rev. 179 (1966), 181-183. *Needle* v. *Scafati,* 289 F.Supp. 1006 (1968).

If undue delay itself is sufficient without the necessity of showing prejudice, then the eight years' delay should entitle the accused to be discharged. *United States* v. *Lustman,* 258 F.2d 475, 477-78 (2d Cir. 1958). However, if the constitutional right to speedy trial requires a showing of prejudice, the burden of proof should be on the State rather than the accused.

"Even if he is permitted to discover police documents, many facts within the knowledge of the government may never have been put on paper. And the discovery of police documents will not be of assistance in those cases in which the prosecuting attorney is responsible for the delay. The defendant will still be forced to rely upon potentially hostile government witnesses to

sustain his burden of proof." *The Right to a Speedy Trial,* 20 Stan.L.Rev. 476, 503 (1968).

The doctrine of putting the burden on the prosecutor to show no prejudice has been recognized by both federal and state jurisdictions. In *United States* v. *Dillion,* 183 F.Supp. 541 (S.D.N.Y. 1960), where the defendant was discharged after an eight year delay, the burden was placed on the government. *People* v. *Prosser,* 130 N.E.2d 891, 895 (N.Y. 1955), held that the duty was on the state to protect the accused's right to speedy trial:

> "It is likewise the state which has the duty of seeing that the defendant is speedily brought to trial."

Delay of a trial which results in prejudice to the defense is so detrimental that an individual cannot be assured of having a fair trial.

III.

The Denial of the Right to a Speedy Trial Should Result in Absolute Discharge of Petitioner.

Since the right to a speedy trial exists for only a certain period of time, it would seem that where there has been a denial of this right, absolute discharge is the only solution. Florida has adopted the view that, after three consecutive requests, if trial is not granted, an absolute discharge is in order. See 915.01 and 915.02, F.S.; *Dickoff* v. *Dewell,* 9 So.2d 804 (Fla. 1942).

In A.B.A. Project, *Standards Relating to Speedy Trial* (Appr. Draft, 1968), the American Bar Association has

taken the position that, when there has been denial of speedy trial, the accused should be discharged.

> "The position taken here is that the only effective remedy for denial of speedy trial is absolute and complete discharge. If, following undue delay in going to trial, the prosecution is free to commence prosecution again for the same offense, subject only to the running of the statute of limitations, the right to speedy trial is largely meaningless. Prosecutors who are free to commence another prosecution later have not been deterred from undue delay. See e.g. Brummitt v. Higgins, 80 Okla. Crim. 183, 157 P.2d 922 (1945)." pp. 40-41

Some state and federal courts have followed the doctrine of complete dismissal when trial has been unnecessarily delayed. *State* v. *Artz,* 191 N.W. 605 (Minn. 1923); *Bell* v. *State,* 220 So.2d 287 (Miss. 1969); *United States* v. *Provoo,* 17 F.R.D. 183 (D. Md. 1955); *Pellegrini* v. *Wolfe,* 283 S.W.2d 162 (Ark. 1955); *Jones* v. *State,* 164 So.2d 799 (Miss. 1964); *State* v. *Milner,* 149 N.E.2d 189 (1958); *Williams* v. *United States,* 250 F.2d 19 (D.C. Cir. 1957); *United States* v. *Chase,* 135 F.Supp. 230 (N.D. Ill. 1955); *United States* v. *McWilliams,* 163 F.2d 695 (D.C. Cir. 1947); *United States* v. *Dillion,* 183 F.Supp. 541 (S.D.N.Y. 1960).

Obviously, it is impossible at this late date for petitioner to be accorded a speedy trial. The courts below erred in denying petitioner the relief requested.

Conclusion

For the reasons set out above, the judgment of the Florida District Court of Appeal, First District, should be reversed and petitioner should be discharged from the sentence.

Respectfully submitted,

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December, 1969

APPENDICES

APPENDIX "A"

Stipulation of Facts

A. An affidavit was filed and sworn to by the Deputy Sheriff of Gadsden County, Florida on July 1, 1960, charging petitioner with robbery of Clark's Motor Court in Gadsden County, Florida on June 28, 1960.

B. An arrest warrant was issued by the Justice of the Peace, Gadsden County, Florida on July 1, 1960, charging petitioner with robbery on June 28, 1960. The warrant was based upon the affidavit executed by the Deputy Sheriff of Gadsden County, Florida.

C. The warrant was placed in the hands of the Sheriff of Gadsden County, Florida on July 1, 1960, but was never served on petitioner.

D. Petitioner was in the custody of the United States Federal Government and was incarcerated in the Jackson County Jail, Marianna, Florida on federal criminal charges from July 1, 1960 until September 2, 1960, when he was transferred into federal custody outside the State of Florida. The petitioner was visited in the Jackson County Jail by the eyewitness and the Deputy Sheriff who executed the affidavit. The jailer was present.

E. Petitioner's arrest warrant was sent to Adam Lewis, Chief U. S. Marshal, Atlanta, Georgia on September 2, 1960, and a formal detainer was lodged against the petitioner for the charge of robbery in Gadsden County, Florida. This detainer was processed through the office of the Gadsden County Sheriff's Department. Federal authorities acknowledged that a formal detainer had been lodged against petitioner from September 2, 1960 until petitioner was returned to the State of Florida, and that he was wanted in the State of Florida for the crime of robbery which occurred on June 28, 1960 in Gadsden County, Florida. Petitioner remained in federal custody

outside the territorial limits of the State of Florida from September 2, 1960 until January 23, 1968, when he was returned to the State of Florida to answer the charges of robbery.

F. During the period petitioner was in federal custody, he filed a Writ of Habeas Corpus Ad Prosequendum with the Clerk of the Circuit Court, Gadsden County, Florida on October 29, 1962, requesting the charge be dismissed or that he be returned to the State of Florida to stand trial. The trial court having jurisdiction of this case denied petitioner's Writ on December 1, 1962. Petitioner filed a second Writ, asking for dismissal of the charges or to be returned for trial on April 1, 1963, and the trial court having jurisdiction entered its Order on April 15, 1963, denying the Writ and citing its Order of December 1, 1962. Petitioner then filed a Motion for Speedy Trial or dismissal on March 28, 1966, and it was again denied on April 13, 1966 by the trial court having jurisdiction. Petitioner then filed original Mandamus proceedings in the Supreme Court of Florida and, in an Opinion dated June 14, 1967, in *Dickey* v. *Clerk of the Circuit Court of Gadsden County,* 200 So.2d 521, the Supreme Court of Florida indicated that the State of Florida should initiate proceedings to have petitioner brought back for trial or that the detainer should be withdrawn. The Supreme Court of Florida held that the petitioner had the right to reassert his demands in a new petition naming the proper prosecuting authority. Petitioner filed a Petition for Dismissal, dated September 1, 1967, claiming that his right to a speedy trial had been denied him as guaranteed by the Sixth and Fourteenth Amendments to the Constitution of the United States of America, and he named in this petition the proper prosecuting authority.

The State Attorney, Second Judicial Circuit, filed with the trial court having jurisdiction of this matter, a Petition for a Writ of Habeas Corpus Ad Prosequendum, requesting that the court enter its order to have the petitioner returned to the State of Florida to stand trial for

the June 28, 1960 robbery charges. The hearing was held ex parte. The trial court having jurisdiction, in an order dated December 15, 1967, ordered the petitioner to be returned to Florida on January 23, 1968 to answer the charges against him.

G. On January 23, 1968, the Public Defender's Office, Second Judicial Circuit, was appointed to represent petitioner. At this time petitioner entered a plea of not guilty, and trial was scheduled for January 31, 1968. On January 30, 1968, petitioner, through his attorneys, filed a Motion for Continuance, stating that petitioner was unable to locate two material witnesses to his defense, A. D. Bud Strickland of Savannah, Georgia and E. D. Dolan of Jacksonville, Florida. Strickland would have testified that petitioner, on the night of the robbery, was in Waycross, Georgia, a town approximately 175 miles east of the town where the robbery was committed; and Dolan would have testified that petitioner had been in Clark's Motor Court on a number of occasions prior to the robbery and would not have robbed Mrs. Clark since she, in fact, knew and could have recognized him. An affidavit dated January 31, 1968, executed by petitioner, stated that a material witness, Mrs. Hazel Varnadore, who had died in 1964, would have testified that petitioner was in Waycross, Georgia on the night the crime was committed, and petitioner had placed a telephone call to her in Florida around twelve midnight. The State did not traverse the allegations in the Motion for Continuance, which was sworn to by petitioner's attorney. Petitioner filed a Motion to Quash, dated January 30, 1968, alleging that he had been denied the right to a speedy trial, based upon the Sixth and Fourteenth Amendments to the United States Constitution.

H. Petitioner filed a second Motion for Continuance on February 9, 1968 for the trial which was scheduled on February 13, 1968, on grounds that Bud Strickland could not be located. The motion was sworn to by petitioner's attorney and was not traversed by the State. The court, on February 13, 1968, denied the second Motion for Continu-

ance and Motion to Quash, and ordered the petitioner to trial on that date.

I. During the course of the trial, Mrs. Clark had testified that she had visited the Jackson County Jail, Marianna, Florida, in the company of the Deputy Sheriff and the jailer from Gadsden County, and had identified petitioner as the person who had robbed her. Petitioner was alone in a cell. Prior to visiting the jail, Mrs. Clark, the eyewitness to the crime, had been told by the Deputy Sheriff who executed the affidavit that the petitioner was incarcerated in the Jackson County Jail, and the deputy had shown a picture of the petitioner to Mrs. Clark. The Deputy Sheriff testified that the jailer, who was present when Mrs. Clark, the eyewitness, had identified petitioner as the person who robbed her, had since died and was not available for the trial. The Deputy Sheriff also testified that Mrs. Clark, the eyewitness, had given him a description of the robber and that he had written this description down and had used this written description for a radio broadcast, but after several years he had destroyed the notes containing the description.

J. Petitioner was tried by a jury and convicted of robbery, and the court sentenced petitioner to serve ten years in the state penitentiary at hard labor, sentence to run consecutively to any sentence at which petitioner is presently serving. The maximum penalty for robbery in the State of Florida is life imprisonment.

K. Petitioner appealed the judgment of conviction to the First District Court of Appeal, State of Florida, and raised the constitutional question that petitioner's Sixth and Fourteenth Amendment rights to a speedy trial had been denied. The First District Court of Appeal, State of Florida, ruled on the constitutional question and affirmed petitioner's conviction. Petitioner duly filed Petition for a Writ of Certiorari to this Court.

L. The first motion for continuance was granted by the court on January 31, 1968.

APPENDIX "B"

Florida Statutes

915.01 SPEEDY TRIAL; REDUCTION OF BAIL; DISCHARGE OF PRISONER.

(1) When a person has been committed to custody to answer any criminal charge, and shall apply to the court on the first day of the term to which he has been committed, that he desires to be brought to his trial before the end of the term, and shall not be indicted or informed against at that term, unless it appear to the satisfaction of the court that the witnesses could not be procured, the court shall set him at liberty upon his giving bail in a reasonable penalty to appear at the next term. If the person in custody be not indicted or informed against in the second term, unless the attendance of witnesses is prevented by himself, he shall be discharged from imprisonment; and if he is not tried at or before the third term after the date he is first committed, he shall be forever discharged from the crime.

(2) When a person has been arrested and released on bond, and thereafter for three successive terms of court, files a written demand for trial (serving a copy on the prosecuting attorney) and he is not brought to trial at or before the third full term after the date he is first committed, he shall be forever discharged from the crime; provided, however, the attendance of the witnesses is not prevented by himself, and he has filed no pleading seeking a continuance.

915.02 SPEEDY TRIAL FOR PERSONS SERVING TERMS OF IMPRISONMENT.

Any person serving a sentence or sentences of imprisonment for crime in this state who has a charge of crime pending against him in this state and who, while impris-

oned under such sentence or sentences, files in the court having jurisdiction to try said charge, on or within thirty days before the first day of each of three successive terms thereof, a written demand for trial, serving a copy upon the prosecuting attorney and who is not brought to trial by the end of the third of such terms, shall be forever discharged from the said crime; provided that the attendance of the witnesses is not prevented by him; provided that any term of court during which a continuance has been granted for good cause shown to either the accused or the state shall not be counted in computing the three terms.

Certificate of Service

I HEREBY CERTIFY that a copy of the foregoing Brief for the Petitioner has been forwarded by mail to Honorable George R. Georgieff, Assistant Attorney General, Capitol Building, Tallahassee, Florida, Attorney for Respondent, this 28 day of November, 1969.

JOHN D. BUCHANAN, JR.

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IN THE

Supreme Court of The United States

OCTOBER TERM, 1969

NO. 728

ROBERT DEAN DICKEY,

Petitioner,

-vs-

STATE OF FLORIDA,

Respondent.

BRIEF FOR THE RESPONDENT

EARL FAIRCLOTH
Attorney General

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Assistant Attorney General

Counsel for the Respondent.

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BRIEF FOR THE RESPONDENT

OPINIONS BELOW

Respondent agrees that the opinion of the District Court of Appeal in and for the First District of Florida, reported in 215 So.2d 772, and, to the extent necessary to a determination of the cause, the opinion of the Florida Supreme Court, reported in 200 So.2d 521, well may be pertinent for resolution of this matter.

JURISDICTION

Respondent concedes that this Court is vested with jurisdiction to hear and resolve the matter here involved pursuant to Section 1257 (3), 28 United States Code.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Considering this Court's decision in Klopfer v. North Carolina, 386 U.S. 213, 18 L.ed.2d 1, 87 S.Ct. 988, and Smith v. Hooey, 393 U.S. 374, 21 L.ed.2d 607, 89 S.Ct. 575, respondent considers it foolhardy to suggest that neither the Sixth Amendment or the Fourteenth Amendment to the federal constitution are not appropriately involved here. Perforce, we agree that they are.

Certainly at the time petitioner was tried he had Florida's equivalent to the Sixth Amendment as embodied in Section 11 of the Declaration of Rights to the Florida Constitution reading in part as follows:

> "SECTION 11. Rights of Accused; speedy trial; etc.--In all criminal prosecutions, the accused shall have the right to a speedy and public trial, by an impartial jury, in the county where the crime was committed,***"

This is restated in Section 916.01, Florida Statutes, reading as follows:

> "916.01 Right to speedy trial.--In all criminal prosecutions the state and the defendant shall each have the right to a speedy trial."

and is to be implemented in the manner specifically set out in

Section 915.02, Florida Statutes, reading as follows:

> "915.02 Speedy trial for persons serving terms of imprisonment.--Any person serving a sentence or sentences of imprisonment for crime in this state who has a charge of crime pending against him in this state and who, while imprisoned under such sentence or sentences, files in the court having jurisdiction to try said charge, on or within thirty days before the first day of each of three successive terms thereof, a written demand for trial, serving a copy upon the prosecuting attorney, and who is not brought to trial by the end of the third of such terms, shall be forever discharged from the said crime; provided that the attendance of the witnesses is not prevented by him; provided that any term of court during which a continuance has been granted for good cause shown to either the accused or the state shall not be counted in computing the three terms."

We make no reference to Section 915.01, Florida Statutes, since it does not encompass the situation in which petitioner found himself though it does bear on the general matter.

QUESTIONS PRESENTED

In respondent's view, petitioner's questions, though they must be accepted as posed, would perhaps be better restated as follows:

1. Did petitioner receive a speedy trial as allegedly guaranteed him by the Sixth Amendment in conjunction with the Fourteenth Amendment though tried eight years after the offense was committed, during which time he contended that his witnesses could not be located, others had died, and

evidence was destroyed?

2. Did the appropriate provisions of the federal constitution require dismissal of the criminal charge against petitioner in the circumstances?

STATEMENT OF THE CASE

Respondent accepts petitioner's statement of the case as the same appears in his brief at pages three through five thereof.

ARGUMENT

POINT I

PETITIONER WAS GRANTED AS SPEEDY A TRIAL AS THE LAW THEN IN EXISTENCE CONTEMPLATED HE MUST RECEIVE.

No one should now doubt that what this Court said in **Klopfer v. N. C.**, supra, clearly states the federal constitutional mandate that now rests upon the shoulders of the several states insuring a speedy trial.

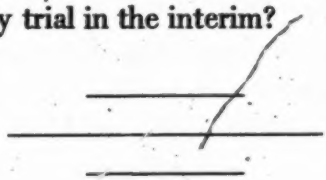
No one should mistake, however, the necessary conclusion that **Klopfer**, supra, works no magic in terms of the right to a speedy trial in the several states (including Florida)--rather that it simply provides yet another basis upon which one aggrieved by the alleged deprivation thereof may complain. In short, prior to **Klopfer**, supra, there simply was no federal right thereto--there now is.

The decision in Klopfer, supra, was rendered on March 13, 1967. The Florida Supreme Court, at page 527 in its opinion in Dickey v. Circuit Court, 200 So.2d 521 (filed on June 14, 1967) clearly acknowledged the fact that hereafter, in light of Klopfer, supra, federal standards could be applied to all questions involving an alleged deprivation of a speedy trial.

Bearing in mind the mandatory provisions of Section 915.02, supra, as well as the fact that petitioner's first two of three complaints were filed respectively on October 29, 1962, and April 1, 1963--some 4 1/2 years before Klopfer, supra, and that his terminal complaint was filed some three years thereafter on March 28, 1966, also before Klopfer, supra, one must wonder at what federal right such complaints engendered at the time.

We observe with considerable interest the total lack of any explanation for the void between July 1, 1960, and December 1, 1962, and the more noticeable one between April 1, 1963, and March 28, 1966.

In short, did the thirty month initial interval mean nothing to petitioner in terms of a speedy trial? We also ask, what of the 36 month interval between his second and terminal complaint--or by chance did he not feel that he was being deprived of a speedy trial in the interim?



It is patently obvious that under the existing law in Florida, whether measured by our own standards or those of Klopfer, supra, petitioner simply failed to initiate his demand for a speedy trial. All he had to do was make three successive demands to be tried on or within 30 days before the first day of

each of three successive terms and serve a copy on the prosecuting attorney. The Circuit Court in and for the Second Judicial Circuit (which embraces Gadsden County, Florida) has two terms of court per year commencing respectively on the first Monday in April and the second Monday in October. See Section 26.23, Florida Statutes.

If one concedes arguendo that prosecution commenced on July 1, 1960, then petitioner had but to make respectively a demand for speedy trial on the second Monday in October of 1960; the first Monday in April, 1961, and the second Monday in October, 1961, in order to be forever discharged. He not only did not do this, but what he did, he did in complete discord with the requirements of Section 915.02, Florida Statutes.

On his first writing petitioner was 28 days late. He was right on the button on his second writing and then, some three years later, decided to file a writing which otherwise might have been in time.

If someone suggests that this is too much to ask of a layman, we would remind such detractors that laymen do not enjoy a better position than those fiscally able to secure the services of counsel. Under Florida law, an individual represented by counsel would obviously be held to the strict demands of Section 915.02, supra. We know of no reason why Florida or indeed the federal government should create unequal protection by bending the judicial willow to allow an insolvent lay prisoner benefits not accorded all persons charged with crimes.

The reason for the continued, repeated demands for speedy trial is to put both the court and the prosecutor on notice that the accused means to be tried speedily. Assuming there is no valid basis upon which to grant continuances at the behest of the state, discharge is (as petitioner's counsel correctly observes) automatic thereafter. Absent such initiating and continuing demands, he must be presumed to know what it is

he wants or does not want just as are others equally charged.

There is an additional reason why such matters cannot be done by petition for writ of habeas corpus ad prosequendum--the bulk of felonies in Florida are tried in criminal courts of record whose jurisdiction embraces the trial of all felonies less than capital. Criminal courts of record have no habeas corpus jurisdiction--therefore any petitions, whether for the ancient writ or ad prosequendum must be dismissed since the court may not even entertain them. Section 915.02, supra, specifically and in considerable detail (albeit with alarming clarity) commands a simple written demand for speedy trial three times running. This goes to all courts with copies served to the appropriate prosecuting official serving that tribunal. We understand that Dickey's forum was the circuit court which has habeas corpus jurisdiction but that does not excuse or justify a gross departure on his behalf when all others are made to hew the line. Without meaning to diminish his concern, he is not in a special class to whom rules do not apply.

Obviously, if we consider that the prosecution was not commenced until December 15, 1967, when the information was filed, then petitioner simply cannot be heard to complain at all since he was tried within fifty days of that date.

We are told that there was ample authority for the return to a state forum of a prisoner confined in a federal penal compound. Respondent finds that hard to believe, at least until

Klopfer, supra, or, in Florida, at least until Dickey, supra, especially in light of the fact that this Court, in Ponzi v. Fessenden, 258 U.S. 254, 66 L.ed. 607, 42 S.Ct. 309, specifically held that there was no authority authorizing such a transfer, acknowledging that such acts did occur but admitting that it was with the consent of the United States Attorney General and then only under the theory of comity. One thing remains clear, comity until Klopfer, supra, was the key and it did operate to effect the return of persons for trial of persons similarly situated, but it was only comity.

The moment the State of Florida, by and through the efforts of its Supreme Court in Dickey, supra, acknowledged this to be the now version of Florida law, the state attorney in and for the Second Judicial Circuit immediately made efforts to secure the return of Dickey for trial--successful efforts.

We would again remind the Court that at the time the petitioner filed his third writing, Klopfer, supra, had not yet been rendered and, for the matter of that, neither had Dickey.

It is also pertinent to note that in none of petitioner's writings did he do anything but ask the state to exercise one of two options, to-wit; remove the detainer or bring me back and try me. When that became the law in Florida (see Dickey v. Circuit Court, supra), Florida exercised the option he offered. Obviously, the result did not please petitioner and that is understandable but it was an option which he posed. It may sound almost absurd to recite in this writing, yet logically it must follow that had petitioner been acquitted of the charge, we would have heard nothing about it.

This, in turn, brings us to the question of why petitioner did not move to prohibit the circuit court from trying him in the first instance in accordance with the specific provisions authorizing such a course as found in Section 80.06 through 80.12, Florida Statutes. If he had really felt himself qualified for discharge from the cause in accordance with Section 915.02, Florida Statutes, there was but one course for him to follow and that was to file a suggestion for writ of prohibition setting out the particulars as its predicate. He may not now plead that he went to court as a lay person for in point of fact, he was represented by the office of the public defender in and for the Second Judicial Circuit and was held thereby to all the rules made applicable to solvent defendants employing counsel of their own choice by the decision of the Supreme Court of Florida in the case of State v. Jones, Fla. 1967, 204 So.2d 515. In short, we no longer have a superclass of criminally charged who owe no fealty to rules held applicable to others. Petitioner is presently serving a sentence of penal confinement which he might otherwise have not had to serve, at least until the question had been resolved by this Court by the simple move of seeking to prohibit his prosecution and upon a loss thereof (had that been the result), an appropriate appeal and if the order denying it were affirmed, then certiorari to this tribunal would have kept him from going to trial. We know not why he elected to take his chances. We would hazard that he was counting on flagging memory and destroyed evidence (state's evidence, of course). Once he lost, he could not complain that he ought not to have been tried. We must once again ask why he felt he should not avail himself of the remedy which would insure that he might not even be tried much less convicted but then it was his choice and we must assume that it was one well made at the time that it was made.

Admittedly, a conviction and a sentence to penal confinement is a most graphic vehicle with which to seek terminal appellate review on certiorari but how long shall we

indulge one who deliberately skirts an open avenue of redress in order to present a more painful side?

When will we tell our citizens that they are presumed to know the law, especially when represented by counsel and that they are obligated to follow it in all instances applicable to their situation?

When will there be a decision of the United States Supreme Court not unlike that in State v. Jones, supra?

When will they be no better than those among us who must pay our way if only because we can and they cannot?

How long after Gideon v. Wainwright, 372 U.S. 335, 9 L.ed.2d 799, 83 S.Ct. 792, will the guardhouse petitioners be indulged in their rule-less judicial endeavors?

Remembering that Dickey, supra, secured from the Florida Supreme Court that which few, if any, would agree would ever really be forthcoming, it is a wonder that such luck or talent when coupled with the services of a public defender of considerable experience and success did not produce a course of conduct more nearly that to which all paying defendants would be held by their counsel.

Certainly there was no constitutional requirement that Dickey be tried either in 1962 or 1963 and it was not until this Court's decision in Klopfer, supra, and that of the Florida Supreme Court in Dickey, supra, that such a situation became the operative law. Therefore, no demands or writing or whatever one may choose to call them, can logically figure into the matter with which this Court must reckon.

More important, however, is the underlying theme which must capture the fancy of all who read Dickey's complaint, paraphrased here as follows:

Who, in their right mind, could possibly believe that a delay of almost eight years between the commission of the crime and trial therefor could be considered speedy?

It seems that he opts for the mere passage of time with a few isolated circumstances as his best auger. It certainly cannot be the mere passage of time, for then what does one do with a foreign sovereign who simply refuses to deliver up for the requesting state? And, if it is the mere passage of time, who is to say (including Florida's Legislature) that eighteen months qualifies as a speedy trial instead of just two months or for the matter of that, two weeks. No one will deny that the three successive term requirement was and is arbitrary as are all rules and/or statutes relating to procedural steps to be followed.

How would a decision favorable to Dickey in this case thwart the ability of prosecution (if it were so inclined) to hold off the filing of an information until the very last possible day so as to insure itself an additional two years in Florida within which to try one known to have committed a crime or believed to have committed a crime? That is a more real than imaginary result if we consider that an individual may not make demand for a speedy trial unless and until there is a formal charge pursuant to which he may be tried, for without such a formal charge, there can be no trial. Circuit courts in Florida may try an individual either upon an indictment or an information if there be no criminal court of record. They may not try an individual on any other legal or judicial writing. Criminal courts of record may only try individuals based upon the filing of an information and nothing else. Dickey could not have been tried at least until the 15th of December, 1967.

The warrant issued on July 1, 1960, was to insure

compliance with the two year limitation period and since, at that very moment Dickey was being held by the federal authorities on a bank robbery charge, there was absolutely no reason to file the information in question until our Supreme Court decreed that the prosecutor must make it or miss. It is not too much to ask of anyone charged with crime today in Florida that they follow the simple and ordinary procedures required of all persons similarly situated.

We do not contend that the federal authorities might have declined to release Dickey for purposes of trial. Indeed, on the first arrangements made, they did release him.

Nor do we contend that the lapse of almost eight years was the result of continuances granted on behalf of the state, for indeed the only continuances ever granted in this cause were those sought by petitioner. In short, we once again come to the simple span of time as the bone of contention here--Dickey was not physically available in Florida for trial--the state, prior to exercising its option, made no effort to secure his return--Dickey failed to comply with any of the requirements of Section 915.02, supra.

As we have said before, there was no authority based upon which Dickey could have been returned prior to Klopfer, supra. See Ponzi v. Fessenden, supra. There may have been precedent for such acts but no authority.

We are also told that it does not matter whether the delay was attributable to inaction on the part of prosecution or the trial court. We do not know what function that observation is supposed to perform. What does matter is inaction or incorrect

action on the part of Dickey. All forms of government are always on the short end of complaints regarding vexatious, arbitrary, capricious or otherwise offensive behavior. They seem to be fair game for that complaint lately. What about Dickey's arbitrary decision or his cavalier disregard for or disinterest in the simple procedure to be followed in such matters? In the posture of the case before this Court, delay on the part of either the prosecutor or the court simply cannot be shown.

It is true that Florida's Constitution and now the federal as well guarantee that the world's Dickeys will receive a speedy trial. In Florida that machinery must be put in motion by the person seeking such a speedy trial. If it were otherwise, then continuances (as often sought by defense as prosecution) would be extremely hard to come by and the state would hold the key to a swift calendar, perhaps to the detriment of a given accused.

Adverting to the complaint about when the prosecution commenced, petitioner would have this Court believe that upon the filing of the warrant (July 1, 1960), said prosecution commenced. For this proposition he cites as authority the case of Rosengarten v. State, 171 So.2d 591. In reality, all Rosengarten, supra, decided with regard to that matter was that for purposes of the statute of limitations, the filing of a warrant was said to commence that interval—not for the purposes of determining whether a Dickey could demand a speedy trial based thereon.

We opt for the position forthrightly presented by petitioner in his brief that for purposes of deciding rights to a speedy trial, we must determine that an individual has been formally charged. See Bruce v. United States, 351 F.2d 318 (5th Cir. 1965); Hoopengarner v. United States, 270 F.2d 465 (6th Cir. 1959), State v. Lee, 419 P.2d 927 (1966); Keyes v. State, 202 A.2d 582 (1964); Harlow v. United States, 301 F.2d 361, 366 (5th Cir. 1962).

Obviously, other authorities hold to the contrary. See Hanrahan v. United States, 348 F.2d 363, 366 (D.C. Cir. 1965); Foley v. United States, 290 F.2d 562 (8th Cir. 1961); Gossett v. Hanlon, 195 So.2d 865, 869 (Fla. 1967); Jacobsen v. Winter, 415 P.2d 297, 300 (Idaho 1966); State ex rel. Fredenberg v. Byrne, 123 N.W. 2d 305, 307 (Wis. 1963).

Petitioner tells us that it ought to be predicated upon the time of arrest. We are not surprised that he does. Yet, what would we do in those jurisdictions in which grand juries or prosecutors decline to file a formal charge until after a complaining petitioner has run out his demands for trial? If we presume prosecution is infected with a vexatious nature such as would defeat a demand for a speedy trial predicated upon a formal charge, then must we not also presume the same nature as to accusatory bodies disinclined to formally charge?

Inasmuch as we are speculating, we might just as well run the entire gamut of man's ability to oppress his fellow man. None of us are angels and not all of us are devils. If malevolent motives are to be lain at the feet of prosecutors and accusatorial bodies, then why not lay the complaint of bias and interest at the feet of individuals situated as was petitioner?

Perhaps the most compelling reason for concluding that in fact petitioner's prosecution was never commenced until December 15, 1967, is that the trial record fails to show that petitioner was ever arrested pursuant to the warrant issued on July 1, 1960, it was sent to the office of the United States Marshal for service on Dickey but apparently he was never served. The marshal's office elected instead to file it as the detainer here involved. That being the case, any complaints regarding a speedy trial prior to December 15, 1967, would appear to be premature.

Terminally, it must be noted that on all three occasions

when Circuit Judge Taylor had before him petitioner's writings, he considered the claims and issued such orders as, in his view, the respective laws of Florida and the federal jurisdiction then obtaining required. In this regard, he was manifestly correct since neither Dickey, supra, nor Klopfer, supra, came into being until after he had issued his third order of denial. He must be presumed to have acted in accordance with sound principles of law. We do not mean to say that he could not have granted some or all of Dickey's wishes. We do mean to say and do say, that there was no compelling authority in existence to require it.

It would be a gross wrong to suggest that he was in error for something that either the Florida Supreme Court or this Court later decided the law ought to be.

Once again we must call the Court's attention to the fact that the simple and non-oppressive requirements of Section 915.02, supra, which would have given Dickey the automatic discharge for which he now opts, were not followed. It is no argument to say that he was but a layman and could not be presumed to know of these things. The reason it is not an argument to so say is that his first two writings were so close to the appropriate date contemplated by the aforementioned section as to make at least this writer doubt that he knew nothing about the provisions. Added to this is the undeniable fact that he went two years before he ever made any alleged claim for a speedy trial. How does this square with what he now purports to demand? By law, both state and federal, at the time he contends he made appropriate demands, it simply cannot be denied that Dickey was in no way deprived of his right to a speedy trial.

POINT II

THE EIGHT YEAR INTERVAL BETWEEN THE COMMISSION OF THE CRIME AND PETITIONER'S TRIAL WAS NOT A DENIAL OF HIS RIGHT TO A SPEEDY TRIAL BECAUSE IT RESULTED IN NO PREJUDICE TO HIS DEFENSE AND PERSON.

Obviously, the question here is whether Dickey suffered any prejudice as a result of the eight year interval. We are aware that this matter must be measured on the span of Smith v. Hooey, supra, and would not deny that in many instances an untoward delay could work a hardship on a given defendant just as a similar delay could work a hardship on the people. The authorities cited by petitioner in his brief for the first proposition we do not quarrel with.

It really does not matter that we refer to cases such as Taylor v. United States, 238 F.2d 259 (D.C. Cir. 1956); United States v. Ewell, 383 U.S. 116, 15 L.ed 2d 627 (1966); or Smith v. Hooey, supra, or for the matter of that, any other authority. The question is, does petitioner's situation fall within those rights?

Deputy Martin in fact either had misplaced, destroyed, or lost his notes regarding the identification given him by the victim of petitioner's robbery. We are told that this worked a hardship on petitioner because if the notes had been available, they would have resolved the conflict regarding the identification of Dickey as the robber. We do not know how that could or would have resulted. What we do know is that

Mrs. Clark (the victim) and Deputy Martin differed as to their ID of petitioner as the assailant. With such a conflict--either as ultimately resolved by the jury or otherwise--what possible difference could it make what these notes might have shown? Under the rule of sequestration in effect during the course of the trial neither one of the witnesses could have derived any particular benefit therefrom at least insofar as to correct the other's testimony. What we are really trying to say is that petitioner had the best of it (going in) without the notes.

We are told that one of petitioner's defense witnesses died during the eight year interval. It is true that she did die, she being his sister but she died in 1964. Her death occurred during the 36 month interval between the filing of the second writing and the last one. Obviously, the State of Florida was not responsible for the death of Mrs. Varnadore as was not the petitioner. The best that can be said of her testimony is that she might have said that she received a telephone call from petitioner, her brother, supposedly from Waycross, Georgia, thereby allegedly lending some credence to his claim of alibi. Just how she knew he was calling from Waycross, Georgia, escapes respondent. Certainly it would mean nothing to have petitioner tell her over the telephone that he was in Waycross nor would it prove anything no matter who said it came from Waycross absent a toll ticket in evidence thereof, of which he makes no mention.

In any case, her testimony was not available to him shortly after he filed his second writing and nothing that Florida did or did not do thereafter would have mattered one whit since she simply would not have been available.

We need not concern ourselves with his complaint

regarding the unavailability of E. D. Dolan since he did appear at petitioner's trial and testified, ostensibly in his behalf.

We are told that one A. C. "Bud" Strickland was absent and that his testimony might have been that he saw petitioner in Waycross, Georgia, on or about the 28th of June, 1960, which, we must presume, would have made it impossible for him to have been in Quincy, Florida, to commit the armed robbery in question. Aside from the fact that this is merely corroborative of what petitioner himself testified to, we wonder why petitioner could not (assuming arguendo he was ever in Waycross that day) simply have driven to Quincy, Florida (a distance of approximately 140 miles), committed the robbery and then gone on about his business?

We note from his testimony in the trial proper a reference to the alleged fact that he was with one A. C. "Bud" Strickland and Mary Ann McAlpin. We inquire as to why petitioner did not elect to secure her as a witness in his behalf regarding his alleged alibi? She was not called and the presumption must follow that her testimony would not have been in accord with his position.

So it is that the matter turns on the absence of or unavailability of one A. C. "Bud" Strickland who, at best, might have been able to swear that Dickey was in Waycross, Georgia, on the 28th of June, 1960. But when on the 28th, if ever, remembering the relatively short distance between Waycross, Georgia, and Quincy, Florida, and the fact that there are 24 hours in a day, respondent must conclude that Strickland's absence meant absolutely nothing in terms of harm to petitioner, especially since Mary Ann McAlpin was not called by petitioner to fill the void.

He has utterly failed to show any prejudice as a result of his being tried when he was either for the reasons set out in his several writings, his brief, or any other reason. Admittedly, if

he is seeking a perfect defense, he did not have it but the state did not have a perfect prosecution either, since Deputy Martin's notes were destroyed. This calls to mind the fact that the jury had before it the very situation involving a woman who, eight years later, swore that Dickey was the man who robbed her and his denial. They had before them the undeniable collision regarding the physical description of Dickey that resulted from the respective testimony of Mrs. Clark and Deputy Martin. The notes of Deputy Martin would not and could not have changed Mrs. Clark's testimony, particularly in light of the fact that with or without any notes, the record clearly reveals that she selected petitioner's photograph from a group of them shown her by Deputy Martin and unerringly picked him from a group of persons jailed in cells in Jackson County Jail at Marianna, Florida. This kind of identification simply could not yield to the existence of notes which were destroyed.

He suffered no prejudice demonstrable or otherwise that would not have been the likely situation whenever he might have been tried and perforce could not complain in that regard.

POINT III

The respondent concedes that if this tribunal should find that, in light of its recent edicts regarding speedy trials and that of the Florida Supreme Court on the same point, petitioner's writings allegedly requesting the same (in complete disregard of the provisions of Section 915.02, supra) long before these decisions came into being, did result in the deprivation to him of his right to a speedy trial, then complete discharge should follow.

CONCLUSION

WHEREFORE, it is respectfully submitted that certiorari should be denied as having been improvidently granted.

Respectfully submitted,

EARL FAIRCLOTH
Attorney General

GEORGE R. GEORGIEFF
Assistant Attorney General

Counsel for the Respondent.

PROOF OF SERVICE

This is to certify that I have forwarded a copy of the Brief for the Respondent to petitioner's counsel, the Honorable John D. Buchanan, Jr., Office of the Public Defender, 201 South Monroe Street, Tallahassee, Florida 32302, by mail, this _____ day of January, 1970.

GEORGE R. GEORGIEFF
Assistant Attorney General

Of Counsel for the Respondent.

NOTICE: This opinion is subject to formal revision before publication in the preliminary print of the United States Reports. Readers are requested to notify the Reporter of Decisions, Supreme Court of the United States, Washington, D.C. 20543, of any typographical or other formal errors, in order that corrections may be made before the preliminary print goes to press.

SUPREME COURT OF THE UNITED STATES

No. 728.—October Term, 1969

Robert Dean Dickey, Petitioner, v. State of Florida. | On Writ of Certiorari to the District Court of Appeal of Florida, First District.

[May 25, 1970]

Mr. Chief Justice Burger delivered the opinion of the Court.

We granted the writ in this case to consider the petitioner's claim that he had been denied his Sixth Amendment right; he was tried in 1968 on charges of alleged criminal acts committed in 1960.

Prior to the commencement of his jury trial in 1968 for armed robbery petitioner, Robert Dickey, moved to quash the information against him, alleging, *inter alia*, that if he were tried he would be denied his right to a speedy trial, as guaranteed by § 11 of the Declaration of Rights of the Florida Constitution[1] and the Sixth Amendment to the United States Constitution.[2] The motion was denied. Dickey was subsequently tried and convicted. He appealed to the Florida District Court

[1] The Declaration of Rights, Florida Constitution, reads in pertinent part:

Section 11. Rights of Accused; speedy trial; etc.—

1. "In all criminal prosecutions, the accused shall have the right to a speedy and public trial, by an impartial jury, in the county where the crime was committed . . . ."

[2] The Sixth Amendment to the United States Constitution provides in pertinent part:

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial . . . ."

of Appeal, First District, alleging error in the trial court's denial of his motion to quash. The Court of Appeal affirmed the conviction in a brief order. 215 So. 2d 772 (1968). We granted Dickey leave to proceed *in forma pauperis* and granted his petition for a writ of certiorari. 396 U. S. 816 (1969). We reverse.

I

At about 2 o'clock in the morning of June 28, 1960, Clark's Motor Court in Quincy, Gadsden County, Florida, was robbed by a lone armed robber. The victim and only eyewitness was Mrs. Ralph Clark. She immediately reported the crime to Deputy County Sheriff Martin and gave a description of the robber to him; this description was routinely recorded for later reference. Shortly thereafter, Dickey was taken into custody on federal bank robbery charges and placed in the Jackson County Jail, Marianna, Florida. Apparently the description Mrs. Clark had given Deputy Martin was sufficiently similar to Dickey that on July 1, 1960, he showed Mrs. Clark a picture of Dickey. Mrs. Clark and Deputy Martin then went to the Jackson County Jail where she identified Dickey as her assailant. Later that day Deputy Martin secured an arrest warrant charging Dickey with armed robbery.[3]

From July 1, 1960, to September 2, 1960, Dickey remained in the Jackson County Jail. The Gadsden County Sheriff's Office knew of his whereabouts but made no effort to serve the warrant or gain custody for the purpose of trial. On September 2, 1960, Dickey, having been convicted on federal charges, was removed from Florida, first to Leavenworth and then Alcatraz.

[3] Under Florida law this step tolled the statute of limitations. See *Rosengarten* v. *State*, 171 So. 2d 591 (Fla. 1965); *Dubbs* v. *Lehman*, 100 Fla. 799, 130 So. 36 (1930); *State* v. *Emanuel*, 153 So. 2d 839 (Dist. Ct. App. Fla. 1963).

On the same day, the Gadsden County warrant was sent to the Chief United States Marshal, Atlanta, Georgia, and a formal detainer was lodged against Dickey.

In 1962, Dickey filed in the Gadsden County Circuit Court a petition styled "writ of habeas corpus ad prosequendum" naming the State Attorney for Gadsden County as respondent and asking that he be required to show cause why he should not be ordered to either take the steps necessary to obtain Dickey's presence in Florida for trial or withdraw the detainer for failure to provide Dickey with a speedy trial, as guaranteed by the Sixth Amendment. The Circuit Court, in an order dated December 1, 1962, denied the petition on several grounds: first, that Dickey's unavailability for trial in Florida was the result of his voluntary commission of a federal crime, the natural consequence of which was incarceration in a federal penal institution; second, that the speedy-trial issue was prematurely raised because only at the time of trial can a determination be made as to whether the delay has made a fair trial impossible; third, that even if the denial of an immediate trial was violative of Dickey's Sixth Amendment rights, it was a deprivation caused wholly by the federal officials having custody of his person, and any relief must flow from those authorities.

Dickey filed papers raising substantially the same contentions on two later occasions, April 1, 1963, and March 28, 1966. The Circuit Court denied both petitions, simply citing the prior denial dated December 1, 1962.

Dickey next petitioned the Supreme Court of Florida to issue a writ of mandamus ordering the Circuit Court to either secure his return for trial or withdraw the detainer against him. The Circuit Court judge filed as a return the orders of December 1962, April 1963, and April 1966. Thereafter the Attorney General of Florida

filed a brief in opposition arguing that Dickey should not be heard to complain that he had not received a speedy trial in Gadsden County because his unavailability was caused by the voluntary commission of criminal acts. Counsel was appointed for Dickey and the Florida Supreme Court heard argument on the petition for mandamus.

The Florida Supreme Court rejected the State's claim that a person incarcerated for one crime has no right to demand his constitutionally guaranteed right to a speedy trial on another charge. *Dickey* v. *Circuit Court*, 200 So. 2d 521 (1967). The court held that incarceration does not make the accused unavailable since there have long been means by which one jurisdiction, for the purpose of a criminal trial, can obtain custody of a prisoner held by another. That court also held that the prisoner's demand upon the accusing State gives rise to an obligation to act affirmatively to secure his presence for trial; failure of the accusing State to promptly obtain the defendant from the detaining sovereign might invalidate any judgment ultimately obtained, if the time lapse is sufficiently great and is not excused.[4] The Florida Supreme Court concluded that once the discretionary decision to charge a prisoner with a crime had been made, an obligation arises to act diligently toward procuring the accused for trial and that obligation is a ministerial duty subject to a writ of mandamus. However, since Dickey had named the Circuit Court as the

[4] The decision of the Florida Supreme Court was based upon both the Florida Constitution's guarantee of a speedy trial, see n. 1, *supra*, and the similar guarantee in the Sixth Amendment, the latter being applicable to the States through the Fourteenth Amendment's Due Process Clause. *Klopfer* v. *North Carolina*, 386 U. S. 213 (1967). The Florida court treated these guarantees as substantively coterminous. See 200 So. 2d 521, 524, 526–527.

respondent, rather than the appropriate State Attorney, the petition was dismissed without prejudice to his right to file another petition naming the appropriate respondent.

On September 1, 1967, Dickey filed with the Circuit Court a motion to have the court order the Gadsden County State Attorney to dismiss the detainer warrant because he had been denied his right to a speedy trial. The State Attorney then filed a petition for a writ of habeas corpus *ad prosequendum* to secure Dickey's return to Florida for trial. On December 15, 1967, the Circuit Court issued the writ, and on the same day the State Attorney filed an information charging Dickey with the armed robbery allegedly committed in 1960. Dickey was returned to Florida on January 23, 1968. On January 30, the day before the trial was to begin, Dickey's appointed counsel filed a motion for a continuance so that the whereabouts of two witnesses could be determined, and a motion asking that the information be quashed on the ground that the delay of over seven years amounted to a denial of Dickey's right to a speedy trial. The motion alleged that the delay was sufficiently prejudicial as to make a fair trial impossible.[5] The Circuit Court granted the continuance but took the motion to quash under advisement. The trial was set for February 13.

Dickey's counsel filed another motion for a continuance, dated February 12, stating that one of the witnesses could not be located and that more time was

[5] The motion to quash stated that an essential and material witness, Mrs. Hazel Varnadore, Dickey's sister, had died in 1964. The motion further stated that had she been available she would have testified that Dickey called her at 12:15 o'clock in the morning of June 28, 1960, from Waycross, Georgia. The motion was accompanied by an affidavit to the same effect, signed by Dickey.

needed.[6] The court denied the motion and, before the commencement of the trial on the next day, denied the motion to quash.

At the trial Mrs. Clark testified from memory as to the description she had given the deputy after the crime, that she had identified Dickey in the Jackson County Jail, and that he was the robber. She stated that she could not recall having seen Dickey before the night of the crime. Deputy Martin also testified concerning the identification at the Jackson jail, noting that the jailer who had been present when Mrs. Clark viewed Dickey had since died. He further testified as to the description of the robber Mrs. Clark had given him, admitting that his memory was hazy and that the notes he had made while investigating the crime had long since been destroyed.

The record indicates that Dickey's defense consisted of his claim that he was in Waycross, Georgia, at the time of the crime and of testimony of another witness that he and Dickey had visited the victimized motel several times. From this latter evidence the defense argued the unlikelihood that Dickey would commit robbery at a place where he was known and would be recognized.

Dickey was convicted and sentenced to 10 years' imprisonment in the State Penitentiary, the sentence to run consecutively with the federal term he was then serving. He then sought review in the Florida District Court of Appeal, alleging that the trial judge had erred in not granting his motion to quash. That court affirmed the conviction without opinion, saying only that "appel-

[6] In both the January 30 and February 12 motions for a continuance Dickey's counsel asserted that he had been unable to locate one A. C. Strickland. The defense expected this witness to testify that he had been with Dickey in Waycross, Georgia, on June 28, 1960, the date of the crime. This witness was never located.

lant. . . . failed to demonstrate reversible error . . . ." 215 So. 2d 772, 773.

II

The record in this case shows that petitioner was available to the State at all times during the seven-year period before his trial. The State suggests no tenable reason for deferring the trial in the face of petitioner's diligent and repeated efforts by motions in the State court in 1962, 1963, and 1966 to secure a prompt trial. In the interval two witnesses died and other potential defense witnesses are alleged to have become available. Police records of possible relevance have been lost or destroyed.

Florida argues that the right of the petitioner under the Federal Constitution did not arise until this Court's decision in *Klopfer* v. *North Carolina*, 386 U. S. 213 (1967), and that not until *Smith* v. *Hooey*, 393 U. S. 374 (1969), was there a constitutional requirement that the State press for trial of a defendant in custody in another jurisdiction.

As noted by the Court in *Smith* v. *Hooey*, the holding of the *Klopfer* case was that

> "the Fourteenth Amendment, [applying] the Sixth Amendment right to a speedy trial is enforceable against the States as 'one of the most basic rights preserved by our Constitution.'" 393 U. S., at 374–375.

From this the Court went on to hold that on demand a State had a duty to make a diligent and good-faith effort to secure the presence of the accused from the custodial jurisdiction and afford him a trial. In *Smith* we remanded the case to the State court without deciding whether the defendant, when available for trial in the State court, would be required to show prejudice arising from the delay.

Here the State of Florida brought the petitioner back to Florida, tried, and convicted him. Petitioner's challenge is directly to the power of the State to try him after the lapse of eight years during which he repeatedly demanded and was denied a trial.

The right to a speedy trial is not a theoretical or abstract right but one rooted in hard reality on the need to have charges promptly exposed. If the case for the prosecution calls on the accused to meet charges rather than rest on the infirmities of the prosecution's case, as is the defendant's right, the time to meet them is when the case is fresh. Stale claims have never been favored by the law, and far less so in criminal cases. Although a great many accused persons seek to put off the confrontation as long as possible, the right to a prompt inquiry into criminal charges is fundamental and the duty of the charging authority is to provide a prompt trial. This is brought sharply into focus when, as here, the accused presses for an early confrontation with his accusers and with the state. Crowded dockets, the lack of judges or lawyers, and other factors no doubt make some delays inevitable. Here, however, no valid reason for the delay existed; it was exclusively for the convenience of the state. On this record the delay with its consequent prejudice is intolerable as a matter of fact and impermissible as a matter of law.

In addition to exerting every effort to require the State to try him, there is present in this record abundant evidence of actual prejudice to petitioner in the death of two potential witnesses, unavailability of another, and the loss of police records. This is sufficient to make a remand on that issue unnecessary.[1] We therefore reverse

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[1] Cf. *Regina* v. *Robins*, 1 Cox Crim. Cas. 114 (Somerset Winter Assizes, 1844).

and remand to the District Court of Appeal of Florida, First District, with directions to vacate the judgment appealed from and discharge the petitioner from custody and from any further proceedings arising out of the charges on which that judgment was based.

SUPREME COURT OF THE UNITED STATES

No. 728.—October Term, 1969

Robert Dean Dickey, Petitioner,
v.
State of Florida.

On Writ of Certiorari to the District Court of Appeal of Florida, First District.

[May 25, 1970]

Mr. Justice Harlan, concurring.

I join the Court's opinion with the following reservation and comment.

I think that claims such as those of the petitioner in this case, arising out of a state proceeding, should be judged by the principles of procedural fairness required by the Due Process Clause of the Fourteenth Amendment, and not by "incorporating" or "absorbing" into the Fourteenth Amendment the "speedy trial" provision of the Sixth Amendment. See my concurring opinion in *Klopfer* v. *North Carolina*, 386 U. S. 213, 226 (1967), and my separate opinion in *Smith* v. *Hooey*, 393 U. S. 374, 383 (1969). This reservation reflects the hope that some day the Court will return to adjudicating state criminal cases in accordance with the historic meaning of the Due Process Clause of the Fourteenth Amendment, see *e. g.*, my dissenting opinion in *Duncan* v. *Louisiana*, 391 U. S. 145, 171 (1968).

However, whether it be the Due Process Clause or the Sixth Amendment that is deemed to apply, I fully agree that petitioner's federal constitutional rights were violated by Florida's actions in this instance.

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[May 25, 1970]

Mr. Justice Brennan, with whom Mr. Justice Marshall joins, concurring.

I

In *Klopfer* v. *North Carolina*, 386 U. S. 213 (1967), this Court held that the Sixth Amendment standards governing speedy trial are made obligatory on the States by the Fourteenth Amendment Due Process Clause. Petitioner's prosecution, however, began in July 1960, nearly seven years before our decision in *Klopfer*. Accordingly, assuming arguendo that *Klopfer* is not retroactive, the question here is whether petitioner's trial was unconstitutionally delayed under the test of due process applicable to the States prior to *Klopfer*. See, *e. g.*, *Beasley* v. *Pitchess*, 358 F. 2d 706 (9th Cir. 1966); *United States ex rel. Von Cseh* v. *Fay*, 313 F. 2d 620 (C. A. 2d Cir. 1963); *Germany* v. *Hudspeth*, 209 F. 2d 15, 18–19 (C. A. 10th Cir. 1954).[1] Petitioner has established his claim. Although the Florida police secured an arrest warrant in 1960 charging petitioner with armed robbery, he was not tried until 1969; he demanded a speedy trial as early as 1962; he has shown that he was substantially prejudiced by the delay; and the State, it appears, was

[1] Cf. *In re Oliver*, 333 U. S. 257 (1948), where, without reliance on the Sixth Amendment, the Court held that a State violates the Due Process Clause by denying an accused a public trial. The Sixth Amendment, of course, links the rights of speedy and public adjudication, guaranteeing in one phrase "a speedy and public trial."

deliberately slow in prosecuting him. Thus, I join the Court's opinion.

I do not read the Court's opinion as deciding that in post-*Klopfer* cases (1) the defendant can challenge only delay occurring after his arrest; (2) he is not entitled to speedy trial unless he demands it at the time of the delay; (3) he must prove actual prejudice, or (4) the delay must be deliberately caused by the government. It is timely to note that the Court has as yet given scant attention to these and other questions essential to the definition of the speedy trial guarantee. Before *Klopfer*, only three of our opinions dealt at any length with the right, and each was decided with little analysis of its scope and content. See *Beavers* v. *Haubert*, 198 U. S. 77 (1905); *Pollard* v. *United States*, 352 U. S. 354 (1957); *United States* v. *Ewell*, 383 U. S. 116 (1966). *Klopfer* itself attempted no extensive analysis; nor did our later decision, *Smith* v. *Hooey*, 393 U. S. 374 (1969). And today we do not consider the effect of the application of the Speedy Trial Clause to the States. Thus, although we said in *Klopfer* that the right to a speedy trial is "one of the most basic rights preserved by our Constitution," 386 U. S., at 226, a guarantee "as fundamental as any of the rights secured by the Sixth Amendment," *id.*, at 223, we have yet even to trace its contours. Accordingly, I think it appropriate to point out certain of the major problems that courts must consider in defining the speedy trial guarantee.

II

In my view, there are two groups of issues to be met in interpreting the right: first, those concerned with when during the criminal process the speedy trial guarantee attaches, and second, those concerned with the criteria by which to judge the constitutionality of

the delays to which the right does attach. These questions, of course, must be answered in light of the purposes of the Speedy Trial Clause.[2] The evils at which the Clause is directed are readily identified. It is intended to spare an accused those penalties and disabilities—incompatible with the presumption of innocence—that may spring from delay in the criminal process. The Court recognized in *Ewell, supra*, at 120, that the speedy trial right "is an important safeguard to prevent undue and oppressive incarceration prior to trial." We also recognized in *Ewell* that speedy trial is intended "to minimize anxiety and concern accompanying public accusation." *Ibid.* As we observed in *Klopfer, supra*, at 222, lengthy prosecution may subject an accused to "public scorn and deprive him of employment, and almost certainly will force curtailment of his speech, associations and participation in unpopular causes."

These disabilities, singly or in league, can impair the accused's ability to mount a defense. The passage of time by itself, moreover, may dangerously reduce his capacity to counter the prosecution's charges. Witnesses and physical evidence may be lost; the defendant may be unable to obtain witnesses and physical evidence yet

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[2] Records of the intent of its Framers are sparse. There is, for example, no account of the Senate debate, and the House deliberations give little indication of the Representatives' intent. See Note, The Right to a Speedy Trial, 20 Stan. L. Rev. 476, 484–485 (1968). Nonetheless, there appears to have been general agreement among the Framers that a speedy trial is essential to fundamental fairness. The principal opposition to the Clause was insignificant: it came from a Representative concerned lest trial be so speedy that an accused not have an opportunity to secure witnesses material to his defense. See 1 Annals of Congress 756; F. Heller, The Sixth Amendment 31 (1951). The Framers seem clearly to have understood and valued the right in the context of its common-law antecedents. See the historical discussion in *Klopfer, supra*, at 223–226.

available. His own memory and the memories of his witnesses may fade. Some defenses, such as insanity, are likely to become more difficult to sustain; as one court has stated, "[p]assage of time makes proof of any fact more difficult. When the fact at issue is as subtle as a mental state, the difficulty is immeasurably enhanced." *Williams* v. *United States*, 250 F. 2d 19, 23 (C. A. D. C. Cir. 1957). See also *Ewell, supra*, at 120.

The Speedy Trial Clause protects societal interests, as well as those of the accused. The public is concerned with the effective prosecution of criminal cases, both to restrain those guilty of crime and to deter those contemplating it. Just as delay may impair the ability of the accused to defend himself, so it may reduce the capacity of the government to prove its case. See *Ponzi* v. *Fessenden*, 258 U. S. 254, 264 (1922). Moreover, while awaiting trial, an accused who is at large may become a fugitive from justice or commit other criminal acts. And the greater the lapse of time between commission of an offense and the conviction of the offender, the less the deterrent value of his conviction.[3]

Deliberate governmental delay in the hope of obtaining an advantage over the accused is not unknown. In such a circumstance, the fair administration of criminal justice is imperiled. The Speedy Trial Clause then serves the public interest by penalizing official abuse of the criminal process and discouraging official lawlessness. See *e. g., United States* v. *Provoo*, 17 F. R. D. 183 (D. Md.), aff'd mem., 350 U. S. 857 (1955). Thus the guarantee protects our common interest that government prosecute, not persecute, those whom it accuses of crime.

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[3] See American Bar Association Project on Standards for Criminal Justice, Standards Relating to Speedy Trial 10–11 (1967); *United States ex rel. Solomon* v. *Mancusi*, 412 F. 2d 88, 93 (C. A. 2d Cir. 1969). (Feinberg, J., dissenting).

III

Against this background of the purposes of the speedy trial safeguard, I turn to the question when during the criminal process the right attaches. A criminal prosecution has many stages, and delay may occur during or between any of them. It may take place at the beginning of the process: between the time at which the government decides to prosecute a man and has sufficient evidence to proceed against him and the actual time of his arrest or indictment.[4] Or it may occur, for instance, between arrest and indictment,[5] during trial or between trial and sentencing.

Authorities agree that delay between indictment and trial is subject to the speedy trial safeguard, *e. g.*, *Lucas* v. *United States*, 363 F. 2d 500, 502 (C. A. 9th Cir. 1966), and there is substantial authority that the right attaches upon arrest, *e. g.*, *Hardy* v. *United States*, 343 F. 2d 233, 234 (C. A. D. C. Cir. 1964). But see, *e. g.*, *Reece* v. *United States*, 337 F. 2d 852 (C. A. 5th Cir. 1964). Similarly, it has been generally held that the Speedy Trial Clause applies to intervals between separate indictments or between separate trials on the same charge, *e. g.*, *Williams* v. *United States*, *supra*. This Court has assumed arguendo, but has not decided, that the interval between judgment and sentencing is governed by the Clause, *Pollard* v. *United States*, *supra*, at 361; see also *Welsh* v. *United States*, 348 F. 2d 885 (C. A. 6th Cir. 1965). I have found no cases dealing with delay

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[4] Delay may also occur during the appellate process or during collateral proceedings. I do not consider those situations here.

[5] By "indictment" I refer to the bringing of charges against a defendant, whether by information, indictment, or some analogous procedure.

during the trial. With some exceptions,[6] it has been held that the right to speedy trial does not apply to delays which occur before the defendant's arrest or indictment, *e. g.*, *Parker* v. *United States*, 252 F. 2d 680, 681 (C. A. 6th Cir. 1958); *Terlikowski* v. *United States*, 379 F. 2d 501, 503–504 (C. A. 8th Cir. 1967).

Does the speedy trial guarantee apply to all delays between a defendant's arrest and his sentencing? The view that it does is not without support in the wording of the Sixth Amendment. The Constitution says that an "accused" is entitled to speedy trial "in all criminal prosecutions." Can it be that one becomes an "accused" only after he is indicted, or that the Sixth Amendment subdivides "prosecution" into various stages, granting the right to speedy trial in some and withholding it in others? In related contexts involving other clauses of the Sixth Amendment, we have held that the "prosecution" of an "accused" can begin before his indictment; for example, in *Escobedo* v. *Illinois*, 378 U. S. 478, 490 (1964), we spoke of the time when "investigation is no longer a general inquiry into an unsolved crime but has begun to focus on a particular suspect." And as regards realization of the purposes of the Speedy Trial Clause, the possibility of harm to interests protected by the Clause is certainly great whenever delay occurs after arrest.[7]

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[6] See, *e. g.*, *Mann* v. *United States*, 304 F. 2d 394, 396–397 n. 4 (C. A. D. C. Cir. 1962); *United States* v. *Reed*, 285 F. Supp. 738, 740 (D. C. D. C. 1968); cf. *Sanchez* v. *United States*, 341 F. 2d 225, 228 n. 3 (C. A. 9th Cir. 1965).

[7] At whatever point delay then occurs, the accused can suffer the penalties and disabilities of a prolonged prosecution. His stock of emotional and financial resources continues to be spent. His capacity to defend himself may be undermined. It is true that once trial has begun, or after one trial has been completed, he should have less difficulty in defending himself; but even then delay can result in the loss of witnesses or deterioration in the value

The applicability of the safeguard to delays occurring *before* arrest or indictment poses a more difficult question. A few courts have reasoned that the language of the Sixth Amendment precludes its application then,[8] and prior to arrest or indictment not all of the interests protected by the right are threatened. The accused suffers no preconviction penalty, since his freedom is not impaired by actual imprisonment or conditioned release. He suffers none of the personal or social disabilities that flow from public accusation. And, so far as society's interest in the effective prosecution of criminal cases is concerned, delay on the government's part need not impair its ability to prove the defendant's guilt beyond a reasonable doubt.[9]

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of available testimony, and, of course, issues for which no preparation was previously made can arise with the passage of time. The government's ability to prove its case can also suffer from delay; even should conviction be obtained, its deterrent value would be lessened by its distance from the offense. And if governmental delay is deliberate, intended to harm the accused, it strikes at the fairness of our criminal process.

[8] See, *e. g.*, *People* v. *Jordan*, 45 Cal. 2d 697, 708, 290 P. 2d 484, 491 (1955). Again, however, it can be argued that it is unrealistic for speedy trial purposes to say that a man is not an "accused" once the government has decided to prosecute him and has sufficient evidence to move against him, or that his "prosecution" does not begin at that time.

[9] The government may delay for a variety of reasons, *e. g.*, to gain time in which to strengthen and document its case while the potential defendant remains unaware, or in the hope that the passage of time will deny him certain witnesses or evidence. The government may also delay, not with a view to ensuring the conviction of the accused, but to use the threat of his trial to coerce him into assisting police operations or becoming a prosecution witness in other cases. Delay, of course, may also result because the government lacks sufficient resources to move more quickly or because it negligently fails to act. When delay is not the result of a purposeful attempt to strengthen the government's case, it will very likely make more difficult proof of the accused's guilt.

Deliberate governmental delay designed to harm the accused, however, constitutes abuse of the criminal process. It lessens the deterrent value of any conviction obtained. And it very probably reduces the capacity of the accused to defend himself; unlike the prosecution, he may remain unaware that charges are pending and thus fail to take steps necessary to his defense.[10] Accordingly, some of the interests protected by the Speedy Trial Clause can be threatened by delay prior to arrest or indictment. Thus, it may be that for the purposes of the Clause to be fully realized, it must apply to any delay in the criminal process which occurs after the government decides to prosecute and has sufficient evidence for arrest or indictment.[11]

Some lower courts have held that the applicable statute of limitations provides the exclusive control over governmental delay prior to arrest or indictment. See, *e. g., United States* v. *Panczko*, 367 F. 2d 737, 739 (C. A. 7th Cir. 1967), which found delay in bringing charges "limited *only* by the statute of limitations." We

[10] Such a person is in much the same position as an accused imprisoned in one jurisdiction who is unaware that another jurisdiction has formal charges outstanding against him. The latter has been held to have the protection of the Speedy Trial Clause, *e. g., Fouts* v. *United States*, 253 F. 2d 215, 218 (C. A. 6th Cir. 1958).

[11] This would not necessarily mean that the government should be denied broad discretion to determine that its evidence is insufficient to make worthwhile an arrest or indictment, nor that it may not have legitimate reasons for delay other than insufficient evidence; moderate delay necessary for law enforcement operations, such as the completion of undercover work involving a number of suspects, may be compatible with the Speedy Trial Clause. And, of course, the question whether, after an accused has been arrested or indicted, he may challenge prior governmental delay is wholly distinct from the question whether before arrest or indictment he may bring an action to compel the government to begin formal proceedings against him.

said in *Ewell, supra,* at 122, that "the applicable statute of limitations . . . is usually considered the primary guarantee against bringing overly stale criminal charges." Such legislative judgments are clearly entitled to great weight in determining what constitutes unreasonable delay. But for some crimes there is no statute of limitations. None exists, for example, in prosecutions of federal capital offenses, 18 U. S. C. § 3281 (1969). And, even when there is an applicable statute, its limits are subject to change at the will of the legislature, and they are not necessarily coextensive with the limits set by the Speedy Trial Clause. Judge Wright, concurring in the result in *Nickens* v. *United States,* 323 F. 2d 808, 813 n. 4 (D. C. D. C. Cir. 1963), observed: "The legislature is free to implement the [speedy trial] right and to provide protections greater than the constitutional right. But the minimum right of the accused to speedy trial is preserved by the command of the Sixth Amendment whatever the terms of the statute." Cf. *Nickens, supra,* at 810 n. 2.

IV

What are the criteria to be used in judging the constitutionality of those delays to which the safeguard applies? This Court has stated that "[t]he right of a speedy trial is necessarily relative. It is consistent with delays and depends upon circumstances. It secures rights to a defendant. It does not preclude the rights of public justice." *Beavers* v. *Haubert, supra,* at 87. We have also observed that "[w]hile justice should be administered with dispatch, the essential ingredient is orderly expedition and not mere speed." *Smith* v. *United States,* 360 U. S. 1, 10 (1959). It appears that consideration must be given to at least three basic factors in judging the reasonableness of a particular delay: the

source of the delay, the reasons for it, and whether the delay prejudiced interests protected by the Speedy Trial Clause.[12]

A defendant may be disentitled to the speedy trial safeguard in the case of a delay for which he has, or shares, responsibility. It has been held, for example, that an accused cannot sustain a speedy trial claim when delay results from his being a fugitive from justice, making dilatory pleadings or motions, or failing to object when a continuance is granted the government,[13] or from delay occasioned by his incompetence to stand trial, *e. g.*, *United States* v. *Davis*, 365 F. 2d 251, 255 (C. A. 6th Cir. 1966).

It has also been held that the defendant's failure, upon being confronted with delay, to demand a speedy trial justifies the denial of his claim.[14] In other words, his silence—or inaction—has been construed as an implied relinquishment of the right to speedy trial, *e. g.*, *United States* v. *Lustman*, 258 F. 2d 475, 478 (C. A. 2d Cir. 1958).[15] The view that an accused loses his right to a speedy trial by silence or inaction is open to question on

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[12] Four factors—length of the delay, the reason for it, prejudice to the defendant caused by it, and waiver by the accused of speedy trial—are often mentioned as the determinants of reasonableness. See, *e. g.*, *United States* v. *Simmons*, 338 F. 2d 804, 807 (C. A. 2d Cir 1964). The length of the delay, however, appears to be significant principally as it affects the legitimacy of the reasons for delay and the likelihood that it had prejudicial effects. And waiver by the accused seems relevant primarily to the source of the delay.

[13] See the cases cited in Note, The Lagging Right to a Speedy Trial, 51 Va. L. Rev. 1587, 1598–1599 (1965).

[14] But see the rejection by some States of the view that the right to speedy trial can be lost by silence or inaction. Representative cases are cited in 51 Va. L. Rev., *supra* n. 13, at 1604 n. 87.

[15] For elaboration of the "demand" rule, see generally Note, The Right to a Speedy Criminal Trial, 57 Col. L. Rev. 846, 852–855 (1957); 51 Va. L. Rev., *supra* n. 13, at 1601–1609.

at least three grounds. First, it rests on what may be an unrealistic understanding of the effect of delay. One court in explaining the "demand" rule stated that it "is based on the almost universal experience that delay in criminal cases is welcomed by defendants as it usually operates in their favor." *United States ex rel. Von Cseh* v. *Fay*, 313 F. 2d 620, 623 (C. A. 2d Cir. 1963). It is true that delay may be welcomed by an accused, especially if he greatly fears the possible consequences of his trial. See *United States* v. *Chase*, 135 F. Supp. 230, 233 (D. C. N. D. Ill. 1955). But an accused may just as easily object to delay for its prolongation of the time in which he must live in uncertainty, carrying the emotional and financial burdens of accusation, and possessing the conditioned freedom of a potential felon. Moreover, the passage of time may threaten the ability of both the defendant and the government to prepare and present a complete case; in this regard, delay does not inherently benefit the accused any more than it does the prosecution.

Second, the equation of silence or inaction with waiver is a fiction that has been categorically rejected by this Court when other fundamental rights are at stake. Over 30 years ago in *Johnson* v. *Zerbst*, 304 U. S. 458, 464 (1938), we defined "waiver" as "an intentional relinquishment or abandonment of a known right or privilege." We have made clear that courts should "indulge every reasonable presumption against waiver," *Aetna Ins. Co.* v. *Kennedy*, 301 U. S. 389, 393 (1937), and that they should "not presume acquiescence in the loss of fundamental rights." *Ohio Bell Tel. Co.* v. *Public Utilities Comm'n*, 301 U. S. 292, 307 (1937). In *Klopfer*, *supra*, at 223, we held that the right to a speedy trial "is as fundamental as any of the rights secured by the Sixth Amendment." It is a safeguard of the interests of both the accused and the community as a whole. Thus,

can it be that affirmative action by an accused is required to *preserve*—rather than to *waive*—the right?

Third, it is possible that the implication of waiver from silence or inaction misallocates the burden of ensuring a speedy trial. The accused has no duty to bring on his trial. He is presumed innocent until proven guilty; arguably, he should be presumed to wish to exercise his right to be tried quickly, unless he affirmatively accepts delay. The Government, on the other hand, would seem to have a responsibility to get on with the prosecution, both out of fairness to the accused and to protect the community interests in a speedy trial. Judge Weinfeld of the District Court for the Southern District of New York has observed, "I do not conceive it to be the duty of a defendant to press that he be prosecuted under an indictment upon penalty of waiving his right to a speedy trial if he fails to do so. It is the duty of the public prosecutor, not only to prosecute those charged with crime, but also to observe the constitutional mandate guaranteeing a speedy trial. If a prosecutor fails to do so, the defendant cannot be held to have waived his constitutional right to speedy trial." *United States* v. *Dillon*, 183 F. Supp. 541, 543 (1960).[16]

If the defendant does not cause the delay of his prosecution, the responsibility for it will almost always rest with one or another governmental authority. The police and prosecutor are not the only governmental

[16] The defendant, in any event, cannot force the beginning of his trial, even if he takes affirmative steps to that end. The present case provides a striking instance of this fact. The government, on the other hand, can and does set the case for trial. Thus, constitutional right aside, the government might reasonably bear the burden of going forward with the trial since it alone has the ultimate capacity to do so. The burden, moreover, might reasonably fall on the government since the prosecutor is the initiating party in criminal proceedings. Cf. Fed. Rule Civ. Proc. 41 (b) (dismissal for failure to prosecute by the plaintiff).

officials whose conduct is governed by the Speedy Trial Clause; it covers that of court personnel as well, *e. g.*, *Pollard* v. *United States, supra; Marshall* v. *United States,* 337 F. 2d 119 (C. A. D. C. Cir. 1964). And the public officials responsible for delay may not even be associated with law enforcement agencies or the courts. Delay, for example, may spring from a refusal by other branches of government to provide these agencies and the judiciary with the resources necessary for speedy trials. See, *e. g.*, *King* v. *United States,* 265 F. 2d 567, 569 (C. A. D. C. Cir. 1959).

When is governmental delay reasonable? Clearly, a deliberate attempt by the government to use delay to harm the accused, or governmental delay that is "purposeful or oppressive," is unjustifiable. See *United States* v. *Provoo, supra; Pollard* v. *United States, supra.* The same may be true of any governmental delay that is unnecessary, whether intentional or negligent in origin.[17] A negligent failure by the government to ensure speedy trial is virtually as damaging to the interests protected by the right as a purposeful failure; when negligence is the cause, the only interest necessarily unaffected is our common concern to prevent deliberate misuse of the criminal process by public officials. Thus the crucial question in determining the legitimacy of governmental delay may be whether it might reasonably have been avoided—whether it was unnecessary. To determine the necessity for governmental delay, it would seem important to consider, on the one hand, the in-

[17] It has been held that negligent delay violates the Speedy Trial Clause, *Hanrahan* v. *United States,* 348 F. 2d 363, 368 (D. C. D. C. Cir. 1965); *United States* v. *Reed,* 285 F. Supp. 738, 741 (D. C. D. C. 1968). Cf. Rule 48 (b) of the Federal Rules of Criminal Procedure, which gives the federal courts discretion to dismiss an indictment if there has been "unnecessary" delay in prosecution.

trinsic importance of the reason for the delay, and, on the other, the length of the delay and its potential for prejudice to interests protected by the speedy trial safeguard. For a trivial objective, almost any delay could be reasonably avoided. Similarly, lengthy delay, even in the interests of realizing an important objective, would be suspect. Perhaps the most important reason for the delay of one criminal prosecution is to permit the prosecution of other criminal cases which have been in process longer than the case delayed. But surely even this objective cannot justify interminable interruption of a prosecution.[18]

Finally, what is the role of prejudice in speedy trial determinations? The discharge of a defendant for denial of a speedy trial is a drastic step, justifiable only when further proceedings against him would harm the interests protected by the Speedy Trial Clause. Thus it is unlikely that a prosecution must be ended simply because the government has delayed unnecessarily, without the agreement of the accused. The courts below, however, are divided in their conclusions regarding prejudice. One court has stated that "we think that a showing of prejudice is not required when a criminal defendant is asserting a constitutional right under the Sixth Amendment," *United States* v. *Lustman*, 258 F. 2d 475, 477–478 (C. A. 2d Cir. 1958); some have held that prejudice may be assumed after lengthy delays, *e. g.*, *Hedgepeth* v. *United States*, 364 F. 2d 684, 687 and n. 3 (C. A. D. C. Cir. 1966). Others have insisted that its existence be shown

[18] As the court stated in *King* v. *United States*, 265 F. 2d 567, 569 (C. A. D. C. Cir. 1959), "cases have to take their turn. The case on trial is entitled to deliberate consideration; the others on the calendar stack up. At the same time, too much heed to practicalities may encroach on the individual's rights. If the legislature were to refuse to install sufficient judicial machinery to perform the judicial tasks, it might be necessary to turn some accused persons loose."

by the defendant, *e. g., United States* v. *Jackson,* 369 F. 2d 936, 939 (C. A. 4th Cir. 1966), some courts shifting the burden of proof to the government after long delay, *e. g., Williams* v. *United States,* 250 F. 2d 19, 21–22 (C. A. D. C. Cir. 1957).

Although prejudice seems to be an essential element of speedy trial violations, it does not follow that prejudice—or its absence, if the burden of proof is on the government—can be satisfactorily shown in most cases. Certainly, as the present case indicates, it can be established in some instances. It is obvious, for example, if the accused has been imprisoned for a lengthy period awaiting trial, or if the government has delayed in clear bad faith. But concrete evidence of prejudice is often not at hand. Even if it is possible to show that witnesses and documents, once present, are now unavailable, proving their materiality is more difficult. And it borders on the imposible to measure the cost of delay in terms of the dimmed memories of the parties and available witnesses. As was stated in *Ross* v. *United States,* 349 F. 2d 210, 215 (C. A. D. C. Cir. 1965): "[The defendant's] failure of memory and his inability to reconstruct what he did not remember virtually precluded his showing in what respects his defense might have been more successful if the delay had been shorter. . . . In a very real sense, the extent to which he was prejudiced by the government's delay is evidenced by the difficulty he encountered in establishing with particularity the elements of that prejudice." Similarly, there is usually little chance of conclusively showing the harm sustained by an accused as a result of public accusation. One commentator has stated that "[t]here is no way of proving the prejudice to the accused which occurs outside the courtroom . . . the public suspicion, the severing of family and social ties, and the personal anxiety." 57 Col. L. Rev., *supra* n. 15, at 864. Nor, of course, is there any ready way of

establishing the prejudice to community interests from delay.

Despite the difficulties of proving, or disproving, actual harm in most cases, it seems that inherent in prosecutorial delay is "potential substantial prejudice," *United States* v. *Wade*, 388 U. S. 218, 227 (1967), to the interests protected by the Speedy Trial Clause. The speedy trial safeguard is premised upon the reality that fundamental unfairness is likely in overlong prosecutions. We said in *Ewell, supra*, at 120, that the guarantee of a speedy trial "is an important safeguard . . . to limit the possibilities that long delay will impair the ability of an accused to defend himself," and Judge Frankel of the District Court for the Southern District of New York has stated that "prejudice may fairly be assumed simply because everyone knows that memories fade, evidence is lost, and the burden of anxiety upon any criminal defendant increases with the passing months and years." *United States* v. *Mann*, 291 F. Supp. 268, 271 (1968).

Within the context of Sixth Amendment rights, the defendant generally does not have to show that he was prejudiced by the denial of counsel, confrontation, public trial, an impartial jury, knowledge of the charges against him, trial in the district where the crime was committed, or compulsory process.[19] Because potential substantial prejudice inheres in the denial of any of these safeguards, prejudice is usually assumed when any of them is shown to have been denied. Because concrete evidence that their denial caused the defendant substantial prejudice is often unavailable, prejudice *must* be assumed, or constitutional rights will be denied without remedy. Prejudice is an issue, as a rule, only if the government wishes to argue harmless error. See *Chapman* v. *California*,

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[19] See the cases cited in 20 Stan. L. Rev., *supra* n. 2, at 494–495.

386 U. S. 18 (1967). When the Sixth Amendment right to speedy trial is at stake, it may be equally realistic and necessary to assume prejudice once the accused shows that he was denied a rapid prosecution.

The difficulty in such an approach, of course, lies in determining how long a prosecution must be delayed before prejudice is assumed. It is likely that generalized standards would have to be developed to indicate when during the course of a delay there arises a probability of substantial prejudice. Until delay exceeds that point, the burden most probably would remain on the accused to show that he was actually harmed. Once, however, delay exceeds that point, prejudice would cease to be an issue, unless the government wished to argue harmless error.[20] Though one temporal standard could very likely govern most prosecutions, account would need to be taken of those types of cases that diverge from the norm.[21]

Thus, it may be that an accused makes out a prima facie case of denial of speedy trial by showing that his prosecution was delayed beyond the point at which a probability of prejudice arose and that he was not responsible for the delay, and by alleging that the government might reasonably have avoided it. Arguably the burden should then shift to the government to establish, if possible, that the delay was necessary, by showing that the reason for it was of sufficient importance to

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[20] We have indicated that "there are some constitutional rights [such as assistance of counsel during trial] so basic to a fair trial that their infraction can never be treated as harmless error." *Chapman*, *supra*, at 23. The same may be true of prosecutorial delays of great length. *Cf. United States* v. *Chase*, 135 F. Supp. 230, 233 (D. C. N. D. Ill. 1955).

[21] For example, less than average delay might give rise to the probability of prejudice in cases where the evidence consists of the testimony of a few witnesses, as opposed to documentary evidence. See the discussion in 20 Stan. L. Rev., *supra* n. 2, at 499–500.

justify the time lost.[22] General standards could be developed by determining, first, the weight to be given various grounds for delay and, then, how great a delay is justifiable for each. Some grounds, such as an attempt to gain an advantage over the accused, would have no value; legitimate reasons might have different weights, an attempt to locate a minor prosecution witness having less justificatory force than an attempt to locate a witness on whose testimony the prosecution hinges.

V.

These comments provide no definitive answers. I make them only to indicate that many—if not most—of the basic questions about the scope and context of the speedy trial guarantee remain to be resolved. Arguments of some force can be made that the guarantee attaches as soon as the government decides to prosecute and has sufficient evidence for arrest or indictment; similar arguments exist that an accused does not lose his right to speedy trial by silence or inaction, that governmental delay which might reasonably have been avoided is unjustifiable, and that prejudice ceases to be an issue in speedy trial cases once the delay has been sufficiently long to raise a probability of substantial prejudice. Insofar as these arguments are meritorious, they suggest that the speedy trial guarantee should receive a more hospitable interpretation than it has yet been accorded.

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[22] The government might appropriately bear this burden, since it, far more than the defendant, is likely to know why the delay took place. Courts below, however, have generally required the defendant to show that the delay was unnecessary, *e. g.*, *Schlinsky* v. *United States*, 379 F. 2d 735, 737 (C. A. 1st Cir. 1967).